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Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

JOSUE G. REYES-HERNANDEZ, a/k/a CHEITO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID W. ROMAN, Esquire
Counsel of Record for the Petitioner
53 Palmeras Street, Suite 1401
San Juan, PR 00901-2417
Telephone: (787) 725-3312
Fax: (787) 723-7209

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QUESTIONS PRESENTED

I. In a criminal prosecution for theft of monies which are insured by or belong to the federal government, may the government be excused from its obligation to present evidence that the monies stolen either belong to or are insured by the United States?

II. In a criminal prosecution for use of a firearm in the course of committing a federal offense, may the government's failure to allege in the indictment which type of weapon was used for purpose of an enhanced sentence ever be harmless error?

PARTIES BELOW

Josué Reyes Hernández, Defendant/Appellant-Petitioner

United States of America, Plaintiff/Appellee-Respondent

Other Defendants/Appellants below were:

John Alexis Mojica-Baez, Rodolfo E. Landa-Rivera, Nelson Cartagena-Merced, and Jose Ramos-Cartagena

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OPINIONS BELOW

Decision of the United States Court of Appeals for the First Circuit: *United States of America v. Josue Reyes Hernandez, sub nom., United States v. John Alexis Mojica Baez*, 229 F.3d 292 (1st Cir. Aug. 30, 2000) (No. 98-2350) (2000 WL 12110130), *reh. denied*, November 2, 2000.

STATEMENT OF JURISDICTION

This case arose after a jury tried and convicted Petitioner Josué G. Reyes Hernández and others of the armed robbery of monies insured by and/or belonging to the United States, in Criminal Number 97-CR-0110-003 (JAF) before the United States District Court for the District of Puerto Rico, the Honorable José A. Fusté, United States District Judge for the District of Puerto Rico, presiding.

On November 4, 1998 Petitioner Reyes was sentenced by Judge Fusté to serve one hundred eighty-eight (188) months of imprisonment in Counts One, Two, Three and Four, concurrent with each other but consecutive to a sentence in Count Five of one hundred twenty (120) months of imprisonment, for a total term of imprisonment of three hundred and eight (308) months.

The jurisdiction of the United States Court of Appeals for the First Circuit to entertain this appeal lay in *Title 28, United States Code, sections 1291 and 1294(1)*, because it was an appeal from a final judgment and conviction order of the United States District Court for the District of Puerto Rico; which District is geographically embraced by that Circuit.

This Honorable Supreme Court has jurisdiction to review the decision of the Court of Appeals for the First Circuit by way of certiorari under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V

No person shall be . . . deprived of life, liberty, or property without due process of law.

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation.

STATEMENT OF THE CASE

On May 28, 1997, a federal grand jury sitting in San Juan, Puerto Rico indicted Petitioner Josué G. Reyes Hernández (hereafter Petitioner Reyes) in five counts of violations of federal law. Counts One and Two charged Petitioner Reyes and three others with the armed robbery of federally insured funds belonging to two different banks from an armored car transport company *18 U.S.C. sections 2 and 2113(a)(d)*. Count Three charged them with the armed robbery of funds belonging to the United States from an armored car transport company *18 U.S.C. sections 2 and 2114(a)*. Count Four charged them with the armed robbery of funds from an armored car transport company which contained interstate shipments of money and checks *18 U.S.C. sections 2 and 2117*. Count Five

charged them with use of firearms during a crime of violence *18 U.S.C. sections 2 and 924(c)(1)* but did not specify the type of weapon charged.

The jury trial of Petitioner Reyes began on May 21, 1998. On June 9, 1998, the government rested its case and Petitioner Reyes requested a directed verdict of acquittal pursuant to *Federal Rule of Criminal Procedure 29* on the grounds of lack of jurisdiction because the government failed to present evidence that the money alleged to have been stolen was either federally insured or belonged to the United States. The trial court agreed that none had been presented but denied the motion. On June 15, 1998, Petitioner Reyes rested his case and renewed his *Rule 29* Motion on the same grounds. Again, it was denied. On June 19, 1998, Petitioner Reyes was found guilty by the jury on all five counts against him.

On October 28, 1998, prior to the imposition of his sentence, Petitioner Reyes objected to the District Court's designation, *motu proprio*, of the firearm in Count Five as a semi-automatic weapon for purposes of sentencing enhancement. The semi-automatic nature of the weapon, which was not alleged in the indictment, increased the statutorily mandated punishment from five years to ten years. The District Court overruled the objection, applied the semi-automatic provision of the statute and imposed an enhanced ten-year consecutive sentence. The Petitioner filed a timely appeal.

In an opinion written by Circuit Judge Lynch, a panel of the Court of Appeals agreed that the government had not presented evidence that the money alleged to have been stolen was either insured by or belonged to the

Federal Government. It nevertheless affirmed the convictions, finding that such proof was not necessary because there was no serious dispute that banks are federally insured.

The Court of Appeals also agreed that the indictment in this case charged the Petitioner with use of a firearm, not a semi-automatic weapon. It nevertheless affirmed the imposition of an enhanced sentence (for a semi-automatic weapon) on Petitioner Reyes finding that, while the failure of the Indictment to specify the type of weapon was error under *Castillo v. United States*, 120 S. Ct. 2090 (2000), the same was harmless error.

A timely motion for rehearing and suggestion for rehearing *en banc* were filed. They were denied, without an opinion, on November 2, 2000.

The Petitioner now seeks the review of this Honorable Court.

REASONS FOR GRANTING THE WRIT

I. The decision of the Court of Appeals in this case conflicts with the decisions of the United States Supreme Court in *In re Winship*, 397 U.S. 358 (1970).

The panel opinion in this case conflicts with the decision of the United States Supreme Court in *In re Winship*, 397 U.S. 358 (1970), which requires that the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime charged.

In the case of Petitioner Reyes, the government had to prove, as a jurisdictional basis, beyond a reasonable

doubt that the money alleged to have been robbed was insured by the Federal Deposit Insurance Corporation or belonged to the United States. During the presentation of evidence against Petitioner Reyes, the government utterly failed to produce any evidence to sustain that jurisdictional burden. The government rested its case without presenting any evidence that the money it alleged was robbed was either federally insured or belonged to the United States or was part of an interstate shipment. As required by *F.R.Cr.P. 29* and this Honorable Court, Petitioner Reyes requested a directed verdict of acquittal. The same was denied.

The Court of Appeals' opinion in this case conceded that the government failed to present evidence of facts necessary to sustain federal jurisdiction in this case. It also acknowledged that Petitioner Reyes preserved his appellate right on this issue. However, it rejected Petitioner Reyes' appeal on the grounds that there was no serious dispute that the money was federally insured. Such a conclusion is flatly contrary to *In re Winship*'s requirement that the prosecution prove beyond a reasonable doubt "every fact necessary" to constitute the crime charged. 397 U.S., at 364. To ease the government's heavy evidentiary burden in a criminal case by allowing it to simply "skip-over" facts about which there is "no serious dispute" demeans the Constitutional guarantee of due process of law.

Such an easing was rejected in *Mullaney v. Wilbur*, 421 U.S. 684 (1975), where the Supreme Court struck down the State of Maine's attempt to relieve the prosecution from having to prove the "absence of heat of passion on sudden provocation" in a murder case. At stake in that

case was the improper shifting of the burden of proof. Serious as that was, it pales by comparison to what is at issue here: the existence, *vel non*, of the jurisdictional element of the offense. An indictment which fails to state jurisdictional elements is so fundamentally defective that it may be objected to at any time, even for the first time on appeal. *United States v. Forbes*, 16 F.3d 1294, 1297 (1st Cir. 1994).

The Court of Appeal's opinion in this case treats the jurisdictional elements of a federal criminal offense as mere "disputes" and then goes on to create a new distinction, *i.e.*, disputes which are "serious" and those which are "not serious." Accordingly, "serious" disputes are deserving of full constitutional protection. Conversely, disputes which are "not serious" do not. This cannot be the law. Such treatment and distinction improperly degrades the constitutional importance of the jurisdictional elements of an offense.

Petitioner Reyes pleaded "not guilty" to *all* of the charges in his case. It is elementary and beyond question that such a plea put into issue *all* of the essential elements of the crimes with which he was charged, *including* the jurisdictional allegations specified in the indictment. It was not incumbent upon him to "seriously dispute" the jurisdictional element in the case against him. Simply stated, the government did not present any evidence on the jurisdictional elements it alleged in the indictment. It is contrary to well-settled precedent to allow a conviction in a criminal case where the government has not proved every fact necessary to constitute the crime charged, *In re Winship, supra*. Thus, the Court of Appeal's opinion in this case should be reversed.

II. The decision of the Court of Appeals in this case conflicts with the decision of the United States Supreme Court in *Castillo v. United States*, 120 S. Ct. 2090 (2000), which requires that the type of weapon for which a defendant is to be convicted must be described in the indictment and decided by the jury.

The firearms count of the indictment on which Petitioner Reyes was tried by the jury did not identify the type of weapon charged. Thus, the jury could not possibly find beyond a reasonable doubt that the firearm of conviction was a semi-automatic weapon and thereby subject him to the greater sentence of imprisonment concomitant to such a finding.

Petitioner Reyes' 10-year sentence of imprisonment was based solely on the **trial judge's unilateral determination** (by a mere preponderance of evidence) regarding the type of firearm Petitioner Reyes was guilty of using. Petitioner Reyes objected to the District Court's *motu proprio* classification of the firearm as a semi-automatic weapon at sentencing. The District Court overruled the objection and applied the semi-automatic provision in imposing a ten-year consecutive sentence. This judge-based determination is precisely what the Supreme Court prohibited in *Castillo v. United States*, 120 S. Ct. 2090 (2000).

In *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), this Court held that other than the fact of a prior conviction any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. Id. at 2362-63. Likewise, in federal court, such facts must be

found by a grand jury and alleged in the grand jury's indictment. *See Hamling v. United States*, 418 U.S. 87, 117 (1974) (indictment must charge each and every element of the offense). The enhanced sentence imposed on Petitioner Reyes runs afoul of the rule of *Apprendi*.

Petitioner Reyes was never provided with either fair or adequate pre-trial notice that he would be held accountable for the use of a semi-automatic weapon. The Sixth Amendment requires that a jury, and not a judge, find that the elements of the offense have been proven. *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993). In its opinion in this case, the Court of Appeals misapplied the harmless-error doctrine described in *Neder v. United States*, 527 U.S. 1 (1999). It wrongly assumed that Petitioner Reyes was provided with fair notice prior to trial of the type of weapons with which he was charged. The weapons used during the robbery charged in this case were never specified in the indictment, nor were they ever recovered or presented at trial. In short, Petitioner Reyes received *absolutely no pre-trial notice* of the government's intention to hold him responsible for the use of semi-automatic weapons. Thus, the premise used by the Court of Appeals in considering this case is just not there. Without such notice it was wrong for the Court of Appeals to use the *Neder* harmless-error doctrine in this case and the decision must be reversed.

III. The decision of the Court of Appeals in this case is in direct conflict with the decision of the Court of Appeals in *United States v. Tran*, ___ F.3d ___ (2d Cir. 2000), 2000 WL 1701651, Nos. 99-1278(L), 99-1389.

Applying the same law to the same type of criminal acts, in *United States v. Tran*, ___ F.3d ___ (2d Cir. 2000), 2000 WL 1701651, Nos. 99-1278(L), 99-1389, the Second Circuit Court of Appeals rejected the reasoning applied by the First Circuit Court of Appeals to Petitioner Reyes' case. At issue there, as here, was an indictment which failed to specify the type of weapon alleged to have been used in the offense.

By applying a harmless-error analysis, the First Circuit clearly considered such an omission to be non-jurisdictional. In *Tran*, the Second Circuit rejected that conclusion and found the *harmless-error* doctrine to be inappropriate. In so doing, the Second Circuit sided with the Tenth Circuit that *Neder v. United States*, 527 U.S. 1 (1999), was wrongly used by the First Circuit to brush aside the Petitioner's claim and is inapplicable to the failure of an indictment to state an offense.

Clearly, the split caused in the Circuits by the First Circuit's use of a harmless-error analysis to a clear violation of the *Castillo* rule warrants a review by this Honorable Court.

CONCLUSION

In the case of Petitioner Reyes, the First Circuit Court of Appeals excused the government from having to prove the jurisdictional element on which it based a federal prosecution. The Court of Appeals mistakenly allowed Petitioner Reyes to be sentenced to a penalty greater than the prescribed statutory maximum based upon facts not submitted to a jury, then created an impermissible split among the Circuits by wrongly applying a "harmless error" analysis to the mistake. This Honorable Supreme Court should exercise its authority and grant review in the case of Petitioner Reyes in order to correct the First Circuit's mishandling of the Constitutional protections embodied in the doctrines of burden of proof and grand jury indictments.

Respectfully submitted,

DAVID WILLIAM ROMÁN
Counsel of Record
53 Palmeras Street, Suite 1401
San Juan, PR 00901-2417
Tel. (787) 725-3312
Fax (787) 723-7233

Counsel for the Petitioner

App. 1

United States Court of Appeals,
First Circuit.

UNITED STATES of America, Appellee,

v.

John Alexis MOJICA-BAEZ, Defendant, Appellant.

United States of America, Appellee,

v.

Josue G. Reyes-Hernandez, Defendant, Appellant.

United States of America, Appellee,

v.

Rodolfo E. Landa-Rivera, Defendant, Appellant.

United States of America, Appellee,

v.

Nelson Cartagena-Merced, Defendant, Appellant.

United States of America, Appellee,

v.

Jose Ramos-Cartagena, Defendant, Appellant.

Nos. 98-2349, 98-2352, 98-2350, 98-2353, 98-2351.

Heard June 8, 2000.

Decided Aug. 30, 2000.

Robin J. Adler for appellant Mojica-Baez.

David W. Roman, with whom Brown & Ubarri was on brief, for appellant Reyes-Hernandez.

Rafael F. Castro Lang for appellant Landa-Rivera.

Roberto Roldan-Burgos, by appointment of the court, for appellant Cartagena-Merced.

Miriam Ramos Grateroles for appellant Ramos-Cartagena.

Timothy L. Faerber and Nelson Perez-Sosa, Assistant United States Attorneys, with whom Guillermo Gil, United States Attorney, and Jorge E. Vega-Pacheco, Assistant United States Attorney, were on brief, for appellee.

Before STAHL and LYNCH, Circuit Judges, and GORTON, District Judge.*

LYNCH, Circuit Judge.

Three armed men dressed in security guard uniforms held up the Loomis, Fargo & Co. armored car depot in Ponce, Puerto Rico, on May 13, 1997, while a fourth robber stood watch outside. The robbers took the Loomis Fargo guards captive as they returned to the company's offices in armored vehicles from runs to area banks. All told, the robbers got away with an estimated $5.5 million. Only about half a million dollars was recovered; the weapons used were never recovered. Four of the five defendants involved in this appeal were convicted of the robbery and received sentences ranging from 308 months to 355 months; the fifth defendant was convicted of helping in the aftermath and was sentenced to 150 months imprisonment.

The defendants originally raised a myriad of arguments on appeal. In addition, after the Supreme Court decided *United States v. Castillo*, ___ U.S. ___, 120 S.Ct. 2090, 147 L.Ed.2d 94 (2000), we requested that the parties brief the effect of that decision. None of the defendants

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* Of the District of Massachusetts, sitting by designation.

had raised at trial or on appeal a *Castillo* claim that the use of a semiautomatic assault weapon in the robbery was an element – and not merely a sentencing factor – of a firearms offense. *See* 18 U.S.C. § 924(c)(1)(A), (B). This is our first occasion to discuss the effects of *Castillo* on trials and indictments, and our view on the indictment issue is quite different from the view of another circuit. Save for one sentencing issue regarding one defendant – as to which the government agrees that there was error and that the matter should be remanded – we reject the defendants' arguments.

I.

The four main defendants are John Alexis Mojica-Baez, Josue G. Reyes-Hernandez, Nelson Cartagena-Merced, and Jose Ramos-Cartagena. After a trial lasting almost a month, they were convicted of committing the robbery. Specifically, all four of these defendants were convicted of two counts of armed robbery, in violation of 18 U.S.C. §§ 2, 2113(a), (d); one count of assault, in violation of 18 U.S.C. §§ 2, 2114(a); one count of breaking and entering, in violation of 18 U.S.C. §§ 2, 2117; and one count of using and carrying a firearm in relation to a crime of violence, in violation of 18 U.S.C. §§ 2, 924(c)(1). Another co-defendant, Rodolfo E. Landa-Rivera, was convicted of being an accessory after the fact to the robbery, in violation of 18 U.S.C. §§ 3, 2113(a).[1]

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[1] We address the appeal of another co-defendant, Jessica Vega-Coreano, in *United States v. Vega-Coreano*, No. 99-1343, in an opinion published simultaneously with this one.

The jury reasonably could have found the following facts. Loomis Fargo[2] armored trucks and vans began arriving at the Loomis Fargo depot in Ponce shortly after 7 p.m. on May 13, 1997. The vehicles were returning with cash from the day's routes, which included a stop at a United States Post Office and two federally insured banks, Banco Popular and Banco Santander. When one of the guards from the first vehicle to arrive entered the depot office, he was met by three men carrying long firearms. They told him it was a hold up and that he was not to move or they would shoot him. The three were dressed in uniforms similar to Loomis Fargo uniforms and were wearing bulletproof vests. As four successive trucks arrived at the depot, the three men disarmed the guards, handcuffed them, and locked them in a bathroom. The contents of the Loomis Fargo vehicles were systematically transferred to a Loomis Fargo van commandeered by the robbers. A fourth person, outside, worked in tandem with the three fake guards, communicating with them by walkie-talkie.

The robbers were voluble, threatening the guards, telling them, "Last week we had to kill one guy, so you guys better do what we say." They also told the guards several times how powerful their weapons were, claiming, "This AK-47 that I have here can actually punch through 12 guys," and "This thing can even go through cement." One of the guards recognized a weapon as an AK-47 and heard one of the robbers say, "This is an AK-47, and if I shoot you with this, I'll rip you up. I'll just

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[2] At the time, the company was named Wells Fargo.

rip a part of you off." Another guard described the firearms carried by the robbers as "assault weapons, big weapons."

The robbers also commented on their professionalism. One of the guards testified that the robbers kept saying, "Look how professional we are. We're really professionals." The robbers reiterated that they were professionals, unlike the other robbers who had been quickly caught after a recent, unrelated Brinks robbery.

Once the Loomis Fargo van was loaded, the guard the robbers had forced to help them was trussed and pushed into the small bathroom that held nine other guards. The guards were then locked in and they heard the robbers threaten to set the place on fire. It took the guards about forty minutes to free themselves; they then called for help. The handcuffs had to be cut off of the guards, as the key holes had been soldered (or welded) closed.

The robbers drove the Loomis Fargo van to another location and transferred the money to a different vehicle, but they left thirty unopened bags of money in the Loomis Fargo van.

Evidence tied the defendants to the robbery almost immediately afterwards. When news of the robbery was broadcast on television, Ramos-Cartagena's wife, Jessica Vega-Coreano, told Jessica Diaz-Nevarro, a friend and upstairs neighbor, that Ramos-Cartagena and Reyes-Hernandez had committed the robbery. The evening of the robbery, Ramos-Cartagena and Reyes-Hernandez arrived back at Ramos-Cartagena's house driving a

heavily laden van. Reyes-Hernandez was wearing a uniform similar to a Loomis Fargo uniform. Ramos-Cartagena ran into the house and asked Vega-Coreano for keys. He had a cut on his head and was shirtless. Vega-Coreano gave him a shirt to put on and asked why they had not gotten rid of the clothes, to which he responded, "Forget the shirt, I need the keys, I want the keys, because we have to leave." He found the keys and drove off. A short time later, Cartagena-Merced and Mojica-Baez arrived. Mojica-Baez appeared happy, and he embraced Vega-Coreano and said, "We did it. We did it" or "We won, we won." Cartagena-Merced also appeared to be happy. The robbery was, of course, planned in advance. According to Diaz-Nevarro, the defendants met almost daily during the two weeks prior [sic] the robbery. Diaz-Nevarro also saw Ramos-Cartagena, Mojica-Baez, and Reyes-Hernandez loading ammunition into two long and three short guns the day before the robbery. Landa-Rivera, who ultimately took some of the money to hide, was also seen around the house before the robbery.

A confidential informant reported to the FBI that before the robbery the defendants had stolen a van in the San Juan area. After the robbery, a white van containing veterinary products was found in a parking lot near the Loomis Fargo depot. The van had been stolen from a veterinary products distributor about a week before the robbery. Diaz-Nevarro testified to seeing similar veterinary products in Ramos-Cartagena's house, and, after having obtained warrants to search the defendants' homes (based upon information provided by the confidential informant), FBI agents found such products when they searched the house.

The searches of the defendants' homes produced a wealth of other incriminating evidence, including: $387,000 in cash buried near Mojica-Baez's uncle's house and $13,000 in cash inside the house;[3] AK-47 ammunition and part of the barrel of an AR-15 assault rifle at Mojica-Baez's house; $2,500 in cash in a McDonald's bag hidden in a mattress and over $1,000 in a box and in a magazine at Cartagena-Merced's house; a photograph of Ramos-Cartagena holding an AK-47, AK-47 ammunition, police uniforms similar to Loomis Fargo uniforms, two ski masks, four boxes of two-way radios, some welding equipment, and wrappers from Banco Popular and Banco Santander at Ramos-Cartagena's house; wrappers from Banco Santander, a bag containing almost $8,000 in cash, and a $45,000 check from the Lottery of Puerto Rico made out to Reyes-Hernandez's mother and issued a week after the robbery[4] at Reyes-Hernandez's house; and a total of $8,800 in cash in Landa-Rivera's car.

After their homes were searched, Ramos-Cartagena, Reyes-Hernandez, Mojica-Baez, and Vega-Coreano traveled together to the Geminis Hotel and rented rooms there. From there they moved to the Joyuda Beach Parador Hotel, registering for three rooms under a false name.

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[3] Mojica-Baez's uncle told police that someone had given him the $13,000 to hold and had told him that it was from the Loomis Fargo robbery.

[4] The record does not reveal the government's theory with regard to the lottery check. It would seem that the government believed the check was evidence of money laundering, *see, e.g., United States v. Gonzalez-Maldonado*, 115 F.3d 9, 19 (1st Cir.1997), but there is no evidence in the record to that effect.

Unable to contain themselves with the riches, some of the defendants went on spending sprees. The day after the robbery, Reyes-Hernandez bought a jet ski for $9,300 in cash (carried in a plastic grocery bag). A search of the car in which Ramos-Cartagena, Reyes-Hernandez, Mojica-Baez, and Vega-Coreano were traveling when they were arrested turned up a jewelry store receipt for a $900 cash purchase of two watches. Cash abounded.

Unable to contain themselves verbally, the different defendants made incriminating statements to others. Two days after the robbery, Diaz-Nevarro overheard Reyes-Hernandez, in the presence of Ramos-Cartagena, detailing what happened at the Loomis Fargo office to Vega-Coreano. Diaz-Nevarro also overheard Landa-Rivera describing to Vega-Coreano how the guards had been tied up as they arrived at the depot. Diaz-Nevarro testified that Ramos-Cartagena and Reyes-Hernandez were laughing in response. Once arrested, Reyes-Hernandez, Ramos-Cartagena, and Landa-Rivera told a fellow jailmate, Luis Nevarez-Marrero, details of the planning and execution of the crime and their efforts to get away. When arrested, Landa-Rivera told police that he had been paid $6,000 to watch over two suitcases containing $200,000 each from the Loomis Fargo robbery.

After he was arrested, Ramos-Cartagena told an FBI agent, "We were millionaires for a short time." The jury decided that statement was true.

II.

Many of the arguments are joined by several of the defendants and we cluster them. We deal first with jurisdictional arguments, then with evidentiary objections. As the defendants argue that their evidentiary objections are precursors to their sufficiency of the evidence arguments, we next deal with those sufficiency arguments. Finally, we address the *Castillo* and sentencing issues.

A. Jurisdiction: Whether the money stolen was insured by the FDIC or belonged to the United States

Counts 1 and 2 of the indictment, which alleged violations of 18 U.S.C. § 2113(a), (d), required the government to prove that the money taken during the robbery was insured by the FDIC. *See United States v. Wood*, 780 F.2d 555, 556 (6th Cir.1986). At the close of the prosecution's case, Reyes-Hernandez and Ramos-Cartagena moved for acquittal under Federal Rule of Criminal Procedure 29, arguing that the government had failed to prove this essential element. The motion was denied, and they renew the argument on appeal.

It appears that the prosecution simply forgot to put on evidence as to FDIC insurance in its case in chief. Consequently, the defendants moved for entry of judgment of acquittal after the government rested. Recognizing its blunder, the prosecution requested that the court reopen the prosecution's case in chief to permit it to present such evidence or, alternatively, that the court take judicial notice of the fact that Banco Popular and Banco Santander are insured by the FDIC. The district court then indicated its inclination to reopen to correct a

"purely technical" error and urged the parties to enter into a stipulation. The parties did enter into a stipulation, without prejudice to their appellate rights, that Banco Popular and Banco Santander were both insured by the FDIC. The stipulation was presented to the jury.

On appeal the defendants object to the trial court's intervention on this issue, saying the court assumed the role of the prosecution. We disagree and find that the district court did not abuse its discretion in deciding to reopen. *See United States v. Santana*, 175 F.3d 57, 64 (1st Cir.1999). There was no serious dispute that the banks were federally insured, and the government's lapse was recognized in time.

Count 3 of the indictment, which alleged a violation of 18 U.S.C. § 2114(a), required the government to prove that the money belonged to the United States. *See United States v. Lawrence*, 699 F.2d 697, 701-02 (5th Cir.1983). With regard to his conviction on this count, Ramos-Cartegena presses two arguments. First, he says, § 2114 is limited to offenses having a "postal nexus," and, although the jury instruction indicated that the jury needed to find that postal service money was stolen, the indictment failed specifically to allege that the stolen money belonged to the United States Postal Service. Second, he says there was insufficient evidence for the jury to find that the money belonged to the United States Postal Service. In fact, there was testimony from a Loomis Fargo guard that he had stopped at a United States Post Office before the robbers emptied his truck of its contents at the depot, and documents were introduced estimating losses to the postal service of over $2 million. The evidence was sufficient, and the indictment, which referenced the statute

and specifically charged the robbers with stealing money belonging to the United States, adequately and fairly charged the crime.

B. Evidentiary Rulings

We review the district court's evidentiary rulings for abuse of discretion. *See United States v. Lara*, 181 F.3d 183, 195 (1st Cir.), *cert. denied*, ___ U.S. ___, 120 S.Ct. 432, 145 L.Ed.2d 338 (1999).

1. Admission of Hearsay Statement of Deceased Informant

At trial, FBI Agent Raymond Lopez testified that, as a result of information from a confidential informant, he prepared an affidavit that led to warrants to search the four main defendants' homes on May 23, 1997. Agent Lopez said that the informant had provided information that was detailed, specific, and consistent with information that was not publicly available. As a condition of the admissibility of Agent Lopez's testimony as to what he was told by the informant, the court inquired into why the informant was not available to testify. The response was that he had been murdered. Defense counsel moved for a mistrial, which was denied, or for an instruction. The court, in response, simply instructed the jury that the reason the informant was not there was that he was dead.

Agent Lopez, over objection, testified that the informant had told him that two weeks before the robbery "this group" had stolen a white van in the metropolitan San Juan area in order to commit the Loomis

Fargo robbery; that they had tinted the windows of the van to make it look like a standard Loomis Fargo van; and that the van could be found at a K-Mart shopping plaza near the Loomis Fargo depot. The van was found there. The ostensible purpose of the testimony was to establish that the stolen van had been used in the robbery, and the agent never explicitly testified that the informant meant that the defendants on trial constituted "this group." The court found that the information from the informant had sufficient guarantees of trustworthiness to be admissible hearsay under Federal Rule of Evidence 807.

The court, apparently recognizing in hindsight the dangers posed by the testimony that the informant had been murdered, instructed the jury the next day that there was no claim that the informant's death was related to the case and that his death could not be considered against any defendant.

The defendants level two objections. First, they claim it was error for the court to have allowed the government to introduce evidence that the informant had been murdered. Second, they argue that the informants' statements did not meet the trustworthiness requirements established under *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). This error, they say, denied them their Sixth Amendment right to be confronted with the witnesses against them. *See Lilly v. Virginia*, 527 U.S. 116, 139, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999).

The testimony that the witness was unavailable because he had been murdered was unfortunate, and the trial judge's initial instruction was insufficient. It would

have been far better if the trial judge had immediately made clear that there was no claim, implicit or explicit, that these defendants were somehow responsible for the murder. If matters had been left at that, the defendants would have a very serious claim. But matters were not left at that; the court quickly corrected the error as its first order of business the next morning. That was sufficient.

The second attack, based on Federal Rule of Evidence 807, rests on the premise that the informant's statements lacked common attributes of trustworthiness: the informant never gave his statement under oath, and he never claimed to be an eyewitness. Moreover, his unavailability cannot be attributed to the defendants so as to warrant admission of his statement.

Under *Roberts*, hearsay statements are considered sufficiently trustworthy when the evidence either falls within a firmly rooted hearsay exception or it possesses particularized guarantees of trustworthiness. *See Roberts*, 448 U.S. at 66. This test was recently reaffirmed in *Lilly*, which emphasized that appellate courts should conduct an independent review of the trustworthiness finding. *See Lilly*, 527 U.S. at 136. The informant's statements do not fall within the category of a firmly rooted hearsay exception, so we look for any guarantees of trustworthiness. The justification for a finding of trustworthiness in this case is very thin, and the record on the point is sparse. But this is not a case in which the issue is important to the outcome. The testimony was admitted primarily to show that the defendants stole the van (from which the inference could be drawn that they stole it to use in the robbery). This fact was established by evidence regarding the veterinary products (1) that the van's owner testified

were in the van when it was stolen; (2) that Diaz-Nevarro saw in Ramos-Cartagena's house; (3) that the FBI found in Ramos-Cartagena's house; and (4) that the FBI found in the stolen van. Moreover, there was considerable other evidence linking the defendants to the robbery. If there was any error, it was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

2. Admission of Statements of Witnesses Nevarez-Marrero and Diaz-Nevarro

Reyes-Hernandez and Mojica-Baez seek to raise an argument that had its brief moment in the sun but has since faded. The claim is that two prosecution witnesses received something of value from the government in return for their testimony, to wit, a reduced sentence and a cash stipend respectively, and that this violates 18 U.S.C. § 201(c)(2), which prohibits offering "anything of value" as an inducement to a witness. This court flatly rejected that argument in *Lara*, 181 F.3d at 197-98, and we do so here.

3. Exclusion of Melendez testimony

The defendants wanted to put on evidence from Tomas Melendez attacking the credibility of FBI agent Carlos Cintron, who gave testimony inculpating the defendants. In particular, they wanted to attack the investigation performed by the agent.

The issue of the exclusion of such evidence is, however, more complicated than that. The first salvo by the

defense was to move to dismiss the second superceding indictment, supporting that motion with an affidavit from Melendez to the effect that the indictment was based on statements from Melendez and that Melendez had been coached on what to say by agent Cintron. In response to this, the district court held an evidentiary hearing and heard Melendez testify. The court found that Melendez had committed perjury and ordered his imprisonment. The agent next testified. In the end, the government moved to dismiss the second superceding indictment and proceeded at trial only on the first superceding indictment.

Agent Cintron testified at trial. Cintron testified that he participated in the arrests of Ramos-Cartagena, Reyes-Hernandez, Mojica-Baez, and Vega-Coreano on May 28, 1997, at the Joyuda Beach Parador, and he identified evidence obtained at the time of the arrests. The evidence included false identification cards and a receipt for a May 21, 1997, cash purchase of two expensive watches, both found in Vega-Coreano's handbag; false identification cards in Ramos-Cartagena's wallet; more than $1,000 in cash taken from Reyes-Hernandez's person; and newspapers with stories about the Loomis Fargo robbery. Cintron also testified that Landa-Rivera provided a false name upon his arrest.

After the agent's examination, the defendants indicated they wanted to subpoena the agent to testify in their case. The court, noting the agent had an obligation to testify in another court a few days hence, offered the defendants the opportunity to call him as their witness at that time. The court also noted that it would not permit

testimony on the matters already covered at the evidentiary hearing, that is, matters regarding the second superceding indictment. At the end of the day, the defendants pressed the issue and said they wanted to inquire about the limits and inadequacy of the investigation. The trial judge said those matters could have been covered on cross-examination and that this agent played only a limited role in the investigation, but that he would allow the defendants to recall Agent Cintron if, after a proffer outside of the jury, he was convinced counsel was not attempting to reintroduce the Melendez issue related to the second superceding indictment.

Later in the trial, counsel for Ramos-Cartagena asked the court to permit Melendez to testify. The defense theory was that a cursory investigation had been done – that once a few pieces of seemingly incriminatory evidence were found, the authorities concentrated on trying to link what was found in Ramos-Cartagena's house with the Loomis Fargo robbery. This, they contended, evidenced bias by the government, and that bias was exemplified by Melendez being used by Cintron to obtain the second superceding indictment. The government responded that while that argument may have been relevant to the second superceding indictment, that indictment had been dismissed, and the argument was not relevant to the charges before the jury. Defense counsel countered that the testimony of two other witnesses buttressed their claim that the government had not adequately investigated the crime, and the government agreed that Agent Cintron could be brought back so those points could be pursued. The defendants pressed for permission to call Melendez as a witness, but the court refused, saying

Melendez had committed perjury. Ramos-Cartagena, Reyes-Hernandez, and Mojica-Baez claim the district court erred in not allowing them to call Melendez as a witness.

The district court did not abuse its discretion. As the trial judge recognized, there was considerable danger in getting into a peripheral matter that had already been disposed of – the second superceding indictment. The probative value of Melendez's testimony to the defendants' attempt to attack the government's investigation was weak, at best. The defendants had a number of opportunities to make such an attack, some of which they took. They had the opportunity to recall agent Cintron and chose not take it. The trial judge's ruling, particularly with regard to a witness already determined to be a perjurer, was eminently reasonable.

We need not address the government's additional argument that the proposed Melendez testimony would be prohibited under Federal Rule of Evidence 608 as impeachment by extrinsic evidence.

4. Admission of Tools of the Trade

During the robbery, the gunmen bragged that they were "professionals." At trial, the government put in certain physical evidence seized from the defendants' homes on the theory that the items were the "tools of the trade" of professional robbers. The evidence included ski masks, bullets, a blue police emergency light, and police uniforms. There was no claim by the government that these were used during the Loomis Fargo robbery.

Reyes-Hernandez, Ramos-Cartagena, and Mojica-Baez claim the evidence is impermissible character propensity evidence barred by Federal Rule of Evidence 404(b) and that it should have been excluded as overly prejudicial under Federal Rule of Evidence 403.

There was no error. Disguises are common tools of the trade and have been found admissible even if not used in the crime charged. *See, e.g., United States v. Candelaria-Silva,* 162 F.3d 698, 705 (1st Cir.1998). There was no unfair prejudice to the defendants.

5. Admission of Redacted Post-Arrest Admission of Papo, a Co-Defendant Not On Trial

Rafael A. Baez-Gonzalez was a charged co-defendant who was not on trial with these defendants. On May 23, 1997, FBI agents went to his house and found almost $400,000 hidden on the property. After he received his *Miranda* warnings, he signed a waiver of rights and gave a statement. Baez-Gonzalez's statement, redacted to remove the names of some of the defendants, was admitted at trial through the testimony of an FBI agent. The statement was that one week before the robbery an individual told Baez-Gonzalez that he (the individual) would be coming into some large money and asked Baez-Gonzalez whether he would hold the money for him; and further, that the Friday or Saturday after the robbery, the individual told Baez-Gonzalez that the money was from the Loomis Fargo robbery.

Baez-Gonzalez's redacted statement did not identify any of the defendants. Other evidence identified Mojica-Baez as the individual. Specifically, Nevarez-Marrero (the

fellow jailmate) testified that Mojica-Baez had told him that "somebody had taken from one of his uncles almost half a million dollars, and he was thinking that his own uncle was squealing on him." Nevarez-Marrero further testified that Mojica-Baez had told him that the money was "[f]rom the holdup" and that he (Mojica-Baez) had "given it to his uncle for safekeeping." While there was an overruled objection to Nevarez-Marrero's statement, there was no objection to the FBI agent's testimony about Baez-Gonzalez's statement. A *Bruton* objection was initially made to the Baez-Gonzalez statement, *see Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), but it was withdrawn upon counsel's learning that the statement was redacted.[5] Thus, there was no relevant objection to the Baez-Gonzalez statement, although the issue is now pursued on appeal by Mojica-Baez and Cartagena-Merced.

There was no clear theory of admissibility for Baez-Gonzalez's statement; there is no evidence from the record that the statement was admitted as a co-conspirator statement, and no *Petrozziello* ruling was made as to the statement. *See United States v. Petrozziello*, 548 F.2d 20, 23 (1st Cir.1977). But the defendants did not make these points at trial and so are in a very weak position to argue them now.

The government urges that if there were any error, it was harmless. The defendants say that the claimed error was not harmless, because if the Baez-Gonzalez statement

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[5] Reyes-Hernandez initially objected on the assumption that the government was going to seek to introduce the statement as a declaration against interest.

had not been admitted, the jury would have found that Nevarez-Marrero's statement, which was admissible, was not credible.

If there was any error, it was harmless. Baez-Gonzalez was Mojica-Baez's uncle; a huge and unexplained sum of money was found buried at his home; and, considering the other evidence that linked Mojica-Baez with the robbery, a jury could reasonably infer that it came from Mojica-Baez, whether or not Baez-Gonzalez's statement came in. The inference was given greater strength by Nevarez-Marrero's recounting of Mojica-Baez's own words.

6. Admission of Co-Conspirators' Statements

Mojica-Baez argues that it was a *Petrozziello* violation for the district court to allow Diaz-Nevarro to testify regarding statements made by co-conspirators after the robbery had been committed and to admit the statement Baez-Gonzalez gave following his arrest. *See Petrozziello*, 548 F.2d at 23. Baez-Gonzalez's statement, which was not explicitly admitted as a co-conspirator statement, was discussed above.

The main attack launched is that Diaz-Nevarro's testimony involved statements that were made after the robbery and, thus, after the conspiracy ended. There is a distinction, for purposes of the co-conspirator statement exception to the hearsay rule, between an initial conspiracy to commit a crime and later actions to conceal the crime. *See Grunewald v. United States*, 353 U.S. 391, 399-406, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957); *Krulewitch v.*

United States, 336 U.S. 440, 443-44, 69 S.Ct. 716, 93 L.Ed. 790 (1949); *United States v. Twitty*, 72 F.3d 228, 233-34 (1st Cir.1995).

Our review of the district court's determination that the statements were co-conspirator statements is for clear error. *See United States v. Portela*, 167 F.3d 687, 703 (1st Cir.), *cert. denied*, ___ U.S. ___, 120 S.Ct. 273, 145 L.Ed.2d 229 (1999). The district court found that, in addition to the robbery, the conspiracy included the division and hiding of the money, a ruling that is plainly correct under *United States v. Hickey*, 596 F.2d 1082, 1089-90 (1st Cir.1979). It was hardly clear error for the district court to conclude that the robbers had not divided up all of the abundant cash by the night of the robbery or even immediately thereafter, and it is reasonable to conclude that it would have taken at least a few days to count $5.5 million. The statements Diaz-Nevarro recounted were made well within this time frame.[6]

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[6] Diaz-Nevarro testified as to two statements Vega-Coreano made to her. Vega-Coreano told Diaz-Nevarro on the day of the robbery that Ramos-Cartagena and Reyes-Hernandez "went to Ponce" (the location of the robbery), and, when Diaz-Nevarro mentioned news coverage of the robbery, Vega-Coreano said "it was them." The two Vega-Coreano statements are attacked as not being in furtherance of the conspiracy; but they may be understood as an effort by the one woman implicitly to secure the silence of the other.

Mojica-Baez also challenges Diaz-Nevarro's testimony that, two days after the robbery, she overheard two of the conspirators describing to Vega-Coreano how a guard was hit. Mojica-Baez describes the statement Diaz-Nevarro overheard as coming from Reyes-Hernandez *and* Landa-Rivera. Diaz-Nevarro testified, however, that she heard Reyes-Hernandez

The district court also admitted the evidence on a theory that the conspiracy included the concealment of the crime. The district court found that the conspiracy included "the use of false identifications by some of the defendants to hide their true identities and escape detection and punishment." This ground is much more problematic in light of *Krulewitch*, 336 U.S. at 443-44, but the other ground suffices to admit the statements.

We do not reach the government's alternate ground, that the statements are admissible under Federal Rule of Evidence 807, the residual hearsay exception.

7. Cumulative Evidentiary Errors

The defendants also appear to argue that even if any error in admitting a particular item of evidence was harmless, the cumulative effects of the errors denied them a fair trial. *See United States v. Sepulveda*, 15 F.3d 1161, 1195-96 (1st Cir.1993). Given our rulings on the evidentiary issues and the very limited number of errors we have deemed harmless, there is nothing to this argument.

C. Limiting Instructions

Cartagena-Merced says instructions should have been given limiting to other defendants the testimony of

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making this statement. We assume this is the statement to which Mojica-Baez raises an objection. We do not decide whether this conversation was in furtherance of the conspiracy, as, even if it was error to admit the statement, any error was harmless in light of all the other testimony Diaz-Nevarro gave.

Nevarez-Marrero, the flight evidence, and the evidence of use of false identification cards. No such limiting instructions were sought, and it was hardly plain error, much less an abuse of discretion, for the district court not to give those instructions sua sponte.

Cartagena-Merced also seeks to attack the admissibility of the Diaz-Nevarro testimony and the tools of the trade evidence, attacks that we have already rejected.

D. Sufficiency of the Evidence

1. Mojica-Baez

Mojica-Baez's defense theory apparently was that he was a 19-year-old innocent and that it was his 40-year-old uncle, Baez-Gonzalez, who was one of the robbers. There was evidence, though, that Mojica-Baez was at Ramos-Cartagena's house almost daily during the two weeks preceding the robbery, that he loaded weapons at the house the day before the robbery, and that, after the robbery, he embraced Vega-Coreano, saying "We did it. We did it," or "We won, we won." Mojica-Baez told Nevarez-Marrero that he (Mojica-Baez) had given his uncle money from the Loomis Fargo robbery for safekeeping and that he was worried his uncle was squealing on him. AK-47 ammunition and part of the barrel of an assault rifle were found in his home. Further, Mojica-Baez was arrested while traveling from hotel to hotel after the robbery with Ramos-Cartagena, Reyes-Hernandez, and Vega-Coreano. The evidence was sufficient.

2. Cartagena-Merced

Cartagena-Merced offered an alibi defense that he was at a birthday party for his mother the day of the robbery until some time after 8:00 p.m., and he produced a photograph allegedly showing him at the party. If he had been at the party until at least 8:00 p.m., he could not have been at the robbery. Close scrutiny of the photo showed Cartagena-Merced was wearing a watch, and, according to the government's expert, the time on the watch was either 12:15 or 3:00.[7] His false alibi was itself evidence of guilt.

Cartagena-Merced ultimately premises his insufficiency argument on the alleged "Limiting Instruction" errors discussed above. There were no such errors and the argument fails. Cartagena-Merced was seen at Ramos-Cartagena's house regularly during the two weeks prior to the robbery; he arrived at the house just after the robbery with Mojica-Baez (who then embraced Vega-Coreano and exclaimed that they had been successful); and FBI agents found a McDonald's bag containing $2,500 hidden in a mattress and over $1,000 in a box and

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[7] Cartagena-Merced's expert stated that the watch showed 7:10. However, both Cartagena-Merced's expert and the government's expert agreed that the photo from the previous frame on the roll (which was not of Cartagena-Merced and which, if the photos in fact came from the same roll, had to have been taken prior to the photo of Cartagena-Merced) included a watch showing 7:50. Thus, the jury was entitled to discredit Cartagena-Merced's expert's opinion that Cartagena-Merced's watch showed 7:10 and to infer that the photo of Cartagena-Merced was taken at 12:15 or 3:00 some time after the party.

between the pages of a magazine at his house. The evidence was sufficient to sustain the conviction.

E. Sentencing

1. Use of Semi-Automatic Assault Weapon

Mojica Baez, Reyes-Hernandez, and Ramos-Cartagena say that they should not have been sentenced to the mandatory ten years imprisonment on Count 5 of the indictment for use of a semiautomatic assault weapon. *See* 18 U.S.C. § 924(c)(1)(A), (B). Use of an ordinary firearm results in a sentence of not less than 5 years imprisonment. *See id.* § 924(c)(1)(A). Subsection (B) of the statute provides, in relevant part:

> If the firearm possessed by a person convicted of a violation of this subsection – (i) is a short-barreled rifle, short-barreled shotgun, or semi-automatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years. . . .

Id. § 924(c)(1)(B). A violation of § 924(c)(1) was charged in the indictment without reference to subsection (B) and without any reference to the type of weapon used. Reyes-Hernandez made an objection at sentencing that there was inadequate evidence to support the conclusion that a semiautomatic assault weapon was used.

a. Effect of Castillo

After this appeal was briefed, the Supreme Court decided that the distinctions in 18 U.S.C. § 924(c)(1)

between types of firearms (which result in different sentences), were elements of separate crimes and not just sentencing factors. *See Castillo v. United States*, ___ U.S. ___, ___, 120 S.Ct. 2090, 2091, 147 L.Ed.2d 94 (2000). This means that the question of whether a firearm is a semi-automatic assault weapon must (1) go to the jury, not the judge, and (2) be proven beyond a reasonable doubt, not by a preponderance of the evidence, as is true with sentencing factors. *See Apprendi v. New Jersey*, ___ U.S. ___, ___-___, 120 S.Ct. 2348, 2362-63, ___ L.Ed.2d ___, ___-___ (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."); *Sustache-Rivera v. United States*, No. 99-2128, 2000 WL 1015879, at *1 (1st Cir. July 25, 2000). At our request, counsel filed supplemental briefs on the effect of *Castillo* on this case.

The only objections at sentencing regarding the § 924(c)(1) conviction did not encompass *Castillo*'s distinction between sentencing factors and elements.[8] Nor were the arguments in the initial briefs on appeal addressed to this point. As a result, our review of this type of trial error is for plain error. Plain error review requires four showings: that there was error; that it was plain; that the error affected substantial rights; and that

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[8] Although Reyes-Hernandez argues that his objection at sentencing – that there was insufficient evidence with regard to the type of the weapons used – encompassed *Castillo*'s distinction between a sentencing factor and an element of the crime, that objection clearly did not address the point.

the error seriously affected the fairness, integrity or public reputation of judicial proceedings. *See Johnson v. United States*, 520 U.S. 461, 467, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997); *United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). The first two criteria are met here; there was error, and it was plain, at least by the time of argument on the direct appeal. *See Johnson*, 520 U.S. at 468.

The "affecting substantial rights test" for trial error means that the error must have caused prejudice. *See Olano*, 507 U.S. at 734. However, unlike the harmless error test, in which the government bears the burden of showing that an error did not result in any prejudice, the defendant bears the burden of showing prejudice under the plain error test. *See id.* Thus, the "affecting substantial rights" prong of the test is not satisfied simply by showing that an element of an offense was not submitted to the jury. *See United States v. Perez-Montanez*, 202 F.3d 434, 442 (1st Cir.2000), *petition for cert. filed on* July 5, 2000 (U.S. No. 00-5096); *see also Neder v. United States*, 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (holding that failure to submit an element to the jury is trial error, subject to harmless error review). Instead, to show prejudice, the defendants must demonstrate that the error "affected the outcome of the district court proceedings." *United States v. Colon-Munoz*, 192 F.3d 210, 222 (1st Cir.1999) (internal quotation marks and citation omitted), *cert. denied*, ___ U.S. ___, 120 S.Ct. 1559, 146 L.Ed.2d 463 (2000).

The trial error alleged under *Castillo* is the failure to have submitted the question of whether the robbers used a semiautomatic assault weapon to the jury. We ask, then,

what prospects there were that submission of the question to the jury would have resulted in a different outcome, keeping in mind the higher standard of proof required before a jury. None of the defendants' briefs address the key question: whether, given the evidence actually introduced as to the weapons used, there was any prejudice from the failure to have submitted the question to the jury. Rather than treat the issue as waived, we address it. One of the Loomis Fargo guards testified at trial that one of the robbers was carrying an AK-47. The robbers twice told the guards they had AK-47 rifles, and AK-47 rounds were found at some of the defendants' homes. One of the robbers claimed that his weapon could shoot through cement, and an FBI firearms instructor testified that an AK-47 round is capable of penetrating cement. The FBI firearms instructor also testified that the weapon in the photograph of Ramos-Cartagena was an AK-47. He further testified that an AK-47 can operate either as a semiautomatic or as a fully automatic weapon. In light of this evidence, the defendants have not met their burden of showing prejudice, nor would we, applying the fourth *Olano* factor, find any miscarriage of justice.

The defendants' main argument, though, is based upon the fact that the indictment only charged them with a violation of § 924(c)(1) for use of a firearm during the robbery, but did not specifically charge them with a violation under subsection (B) of the statute or state that a semiautomatic assault weapon was used in the robbery. They urge, therefore, that this is not an instance merely of trial error. This requires, they say, that their convictions

for the § 924(c)(1) violation be reversed,[9] because such indictment errors are not subject to harmless or plain error analysis. In other words, they claim that the indictment was fatally deficient, and that this, per se, requires reversal. They do not argue that the indictment failed to provide them with fair notice of the charge against them.

Mojica-Baez cites to some recent cases for the proposition that omission of an element from an indictment is never harmless error. He relies on *United States v. Du Bo*, 186 F.3d 1177 (9th Cir.1999) (reversing conviction and dismissing indictment for failure to include element of the charged offense), but that case involved a timely pretrial challenge to a deficient indictment. *See id.* at 1179. The case expressly limits its analysis to timely challenges. *See id.* at 1180 n. 3. In a later unpublished opinion, that

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[9] Defendants' choice of remedy is overreaching. There is no question that the indictment fairly and adequately charged them with the basic "use of a firearm" offense under § 924(c)(1)(A). And there is no question that the government proved the elements of that offense beyond a reasonable doubt and that the elements were found by the jury. In fact, there were no objections to the sentencing for the firearm offense until the government requested that the court sentence the defendants to the longer term pursuant to the semiautomatic assault weapon subsection of the statute, and the objections went only to the sufficiency of the evidence. As a result, the only possible relief for the defendants would be a remand for reindictment, *see United States v. Spinner*, 180 F.3d 514, 517 (3rd Cir.1999), or resentencing, *see United States v. Rudisill*, No. 99-4588, 2000 WL 620314, at *1 (4th Cir. May 15, 2000) (per curiam) (unpublished); *United States v. Matthews*, 178 F.3d 295, 301 (5th Cir.), *cert. denied*, ___ U.S. ___, 120 S.Ct. 359, 145 L.Ed.2d 280 (1999). We do not decide whether the proper remedy would be remanding for reindictment or for resentencing.

court declined to abandon harmless error analysis where the claim was not timely made at or before trial. *See United States v. Woodruff*, No. 98-10358, 1999 WL 776213, at ___ 1 n. 5 (9th Cir. Sept. 29, 1999) (unpublished), *cert. denied*, ___ U.S. ___, 120 S.Ct. 2202, 147 L.Ed.2d 237 (2000). Closer to defendants' mark is the Tenth Circuit's recent decision in *United States v. Prentiss*, 206 F.3d 960 (10th Cir.2000), vacating a conviction based on a post-conviction challenge to an indictment that had failed to include an element of the crime charged.[10] *See id.* at 966. The court described the indictment's failure to include all of the essential elements of the offense and the indictment's lack of other language that would have remedied the omission as a "fundamental jurisdictional defect that is not subject to harmless error analysis." *Id.* at 975. *Prentiss* was decided over an argument in dissent that the decision was inconsistent with *Neder*. *See Prentiss*, 206 F.3d at 978-79 (Baldock, J., dissenting). The majority thought *Neder* was inapplicable, primarily because *Neder* involved a failure to submit an element of an offense to a petit jury rather than to a grand jury. *See Prentiss*, 206 F.3d at 977 n. 14. Furthermore, the Third Circuit vacated a guilty plea in *United States v. Spinner*, 180 F.3d 514 (3rd Cir.1999), remanding so that the defendant could be reindicted where the original indictment had failed to allege the interstate commerce element of the crime. *See id.* at 517. *Spinner* did not mention *Neder* and was concerned with

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[10] It is not clear from the *Prentiss* opinion whether the court vacated the conviction or reversed the conviction. The court simply stated that it was vacating the conviction and remanding for further proceedings, but in the following sentence it stated that it was reversing the conviction. *See Prentiss*, 206 F.3d at 977.

an element that went to the constitutionally required basis for federal jurisdiction. In addition, in *United States v. Rudisill*, No. 99-4588, 2000 WL 620314 (4th Cir. May 15, 2000) (unpublished), the court vacated a sentence where the indictment had not referenced the statutory section. *See id.* at *1. *Rudisill* also did not discuss *Neder*.[11]

We accept as true two general propositions. Those propositions do not mean, though, that the defendants' argument is sound. The first proposition is that an objection that an indictment fails to state an essential element of an offense "shall be noticed by the court at any time during the pendency of the proceedings." Fed.R.Crim.P. 12(b)(2). This means that the defendant may raise the objection for the first time on appeal or that this court may raise the issue sua sponte. *See United States v. Forbes*, 16 F.3d 1294, 1297 (1st Cir.1994); *United States v. Seuss*, 474 F.2d 385, 387 n. 2 (1st Cir.1973). The second proposition is that a statutory citation standing alone in an indictment does not excuse the government's failure to set forth each of the elements of an offense. *See Forbes*, 16 F.3d at 1297; *United States v. McLennan*, 672 F.2d 239, 243 (1st Cir.1982). An indictment may incorporate the words of a statute to set forth the offense, but the statutory language "must be

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[11] These cases may be part of a renewed interest in the role of the grand jury as a bulwark against prosecutorial abuse. *See generally* National Ass'n of Criminal Defense Lawyers, *Federal Grand Jury Reform Report & "Bill of Rights"* (2000). As the *Du Bo* court noted, "[a]t common law, 'the most valuable function of the grand jury was . . . to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony. . . . ' " *Du Bo*, 186 F.3d at 1179 (quoting *Hale v. Henkel*, 201 U.S. 43, 59, 26 S.Ct. 370, 50 L.Ed. 652 (1906)).

accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged." *Hamling v. United States*, 418 U.S. 87, 117-18, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974) (quoting *United States v. Hess*, 124 U.S. 483, 487, 8 S.Ct. 571, 31 L.Ed. 516 (1888)) (internal quotation marks omitted). We do not decide here whether the indictment was defective or inadequate for its failure to do more than refer to the "use of a firearm" statute in the context of accusing defendants of using a firearm in the robbery, *see id.* (stating that, to be adequate, indictment must fairly inform a defendant of the charges against him and enable him to assert a double jeopardy defense to future prosecution), but we take it that there is an argument that it was inadequate. The government's brief seems to assume, without analysis, that the indictment was inadequate.

The argument that the sentences should be vacated is premised upon the distinction between "trial error," which is reviewed for prejudice (discussed above), and the more fundamental "structural error," which is per se prejudicial. Certain categories of error interfere with such basic and fundamental constitutional protections that they go to the structure of our criminal law system. These "structural errors" require that convictions, or sentences, be set aside without any examination of prejudice because, among other things, it would be well-nigh impossible to determine the amount of harm. The harm caused by these types of error is surely great, though, as when a defendant is deprived of counsel, *see Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), or when the trial judge is biased, *see Tumey v. Ohio*,

273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927). Other errors have been designated as structural in order to vindicate compelling constitutional policies, such as freeing the trial and grand jury processes from state-sponsored discrimination in the selection of jurors, *see Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986); preserving open and public trials, *see Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984); and reinforcing the core of the principle of proof beyond a reasonable doubt in criminal cases, *see Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).

The error in this case is not of that dimension. No interest in safeguarding fair trials or vindicating compelling constitutional policies would be served by classifying the error here as structural. Nor do we think the integrity of the judicial system is implicated. *See Johnson*, 520 U.S. at 469-70. The reason the indictment in this case did not specify that a semiautomatic assault weapon or AK-47 had been used in the robbery was that circuit precedent at the time did not require it. After the defendants in this case were convicted, but prior to their sentencing, we decided that § 924(c)(1)'s subsections defined sentencing factors and not elements of separate offenses. *See United States v. Shea*, 150 F.3d 44, 51 (1st Cir.), *cert. denied*, 525 U.S. 1030, 119 S.Ct. 568, 142 L.Ed.2d 473 (1998). It is one thing to vacate a conviction or sentence where the prosecutor failed to indict in accordance with the current state of the law. It is quite another thing to vacate a conviction or sentence based on an indictment that was entirely proper at the time. Neither the prosecution nor defense counsel in this case anticipated that the Supreme Court would rule as it did in *Castillo*.

There are some serious harms, to be sure, that can emerge from flawed indictments. The most serious may be when a defendant is without fair notice of the charges against him. *See United States v. Murphy*, 762 F.2d 1151, 1155 (1st Cir.1985). The defendants have not argued on appeal that they lacked fair notice. Moreover, when the government requested that the defendants be sentenced pursuant to the semiautomatic assault weapon subsection, the defendants made no claim of lack of fair notice. The § 924(c)(1) charge against the defendants put them on notice that they could be sentenced for using a semiautomatic assault weapon (pursuant to § 924(c)(1)(B)) if the judge found, by a preponderance of the evidence, that such a weapon had been used.[12] We see no unfairness to the defendants in terms of notice.

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[12] Whether the use of a semiautomatic assault weapon pursuant to subsection (B) of § 924(c)(1) was an element of a separate offense or a sentencing factor had not been decided in this circuit at the time of the defendants' trial. Defendants had a great incentive to raise the issue because of the less rigorous standard of proof upon which a judge could make the finding at sentencing. However, we had already decided, in an analogous context, that the subsections to the federal carjacking statute that provide for longer sentences where a victim suffers bodily injury were sentencing factors, not elements of an independent offense. *See United States v. Rivera-Gomez*, 67 F.3d 993, 1000 (1st Cir.1995). Other circuits agreed. *See, e.g., United States v. Oliver*, 60 F.3d 547, 552 (9th Cir.1995); *United States v. Williams*, 51 F.3d 1004, 1009 (11th Cir.1995). These decisions were later overturned in *Jones v. United States*, 526 U.S. 227, 251-52, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). With regard to § 924(c)(1)'s subsections, at the time of defendants' trial, there was a split among the circuits on the "sentencing factor vs. element" issue. *Compare United States v. Branch*, 91 F.3d 699, 737-41 (5th Cir.1996) (sentencing factor), *with United States v. Alerta*, 96 F.3d 1230, 1235 (9th Cir.1996) (element).

We think we are compelled by the Supreme Court's decision in *Neder* to subject the indictment error in this case to plain error review. In *Neder* the court held that a jury instruction "that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence" and is, therefore, subject to harmless error review. *Neder*, 527 U.S. at 9. This is so even though the Fifth Amendment requires the government to prove every element of a criminal offense beyond a reasonable doubt, *see In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), and the Sixth Amendment requires that a jury, and not a judge, find that the elements of the offense have been proven, *see Sullivan v. Louisiana*, 508 U.S. 275, 277, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). It is true, as the majority in *Prentiss* says, that *Neder* was explicitly concerned with the failure to submit an element of an offense to the petit jury at trial and not with the failure to present an element to the grand jury to secure an indictment. *See Prentiss*, 206 F.3d at 977 n. 14. But we do not think that distinction is significant where the indictment provided the defendant with fair notice of the charges against him. The *Neder* court explained that "most constitutional errors can be harmless." *Neder*, 527 U.S. at 8 (internal quotation marks and citation omitted).

Prior to *Neder*, the Court had recognized other constitutional errors that can be harmless. *See, e.g., Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (erroneous admission of evidence in violation of Fifth Amendment guarantee against self-incrimination may be harmless); *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) (erroneous

exclusion of evidence in violation of defendant's Sixth Amendment right to confront witnesses may be harmless). Against this background, we see no reason why harmless error review should not apply to the failure to include an element in an indictment that otherwise provided the defendants with fair notice of the charges against them. *Cf. United States v. Jackson*, 214 F.3d 687, 690 (6th Cir.2000) (suggesting that harmless error analysis might be appropriate where an element of an offense was not specifically included in the indictment or submitted to the jury).

This approach is consistent with circuit law concerning other defects in indictments. *See, e.g., United States v. Yefsky*, 994 F.2d 885, 894 (1st Cir.1993) (applying harmless error review where indictment did not give the defendant adequate notice of the charges against him, but where adequate notice had been given prior to trial). Even where a defendant alleges that there was misconduct before the grand jury, the harmless error test applies. *See United States v. Mechanik*, 475 U.S. 66, 71-72, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986); *see also United States v. Lamela*, 942 F.2d 100, 104 n. 7 (1st Cir.1991).

The evidence as to use of semiautomatic assault weapons was, at it happens, presented to the petit jury (we are doubtful that much rests on it being presented to the jury as opposed to the judge). That evidence may well have also been presented to the grand jury; we do not know. There is no question that the petit jury in this case would have found that the defendants used at least one AK-47. To paraphrase *Neder*, the indictment's failure to charge the defendants under the semiautomatic assault

weapon subsection of the statute did not necessarily render the indictment unfair or make it an unreliable vehicle with which to commence the proceedings in this case. *See Neder*, 527 U.S. at 9. We reject the argument that *Castillo* requires the sentences be vacated based on an error in the indictment.

b. Sufficiency of the Evidence

Viewing the issue not as a *Castillo* issue but simply as an issue of whether the trial judge's determination was sufficiently supported by the record, we find there was no error. The 10-year sentences under § 924(c)(1)(B) for Ramos-Cartagena, Cartagena-Merced, Reyes-Hernandez, and Mojica-Baez are affirmed.

2. Landa-Rivera's Sentencing

Landa-Rivera was convicted of being an accessory after the fact to the robbery, in violation of 18 U.S.C. §§ 3, 2113(a). He makes two arguments on appeal. First he says, and the government agrees, that while he was charged and convicted for being an accessory to a simple robbery, *see* 18 U.S.C. § 2113(a), he was erroneously sentenced as though he were an accessory to an armed robbery, *see* 18 U.S.C. § 2113(d). The government asks that this aspect of the sentence be remanded for resentencing, and we do so.

Second, Landa-Rivera argues that the district court erred in calculating his total offense level. We review the applicability and interpretation of a sentencing guideline

de novo, but we review the district court's factual findings at sentencing only for clear error. *See United States v. Cali*, 87 F.3d 571, 575 (1st Cir.1996). Landa-Rivera makes two separate claims relating to the calculation of his offense level. First, he claims the court incorrectly increased his offense level for "specific offense characteristics that were known, or reasonably should have been known, by the defendant." U.S.S.G. § 2X3.1, application note 1. According to Landa-Rivera, since being an accessory after the fact is not itself a crime of violence, sentencing enhancements related to the violent nature of the robbery in this case should not apply to him. He is incorrect. The relevant Guidelines sections make clear that the specific characteristics of the underlying offense constitute relevant conduct for the purpose of calculating an accessory sentence. Application note 1 of § 2X3.1 (the accessory after the fact guideline) references § 1B1.3, application note 10, for purposes of computing the total offense level. That note, in turn, states, "In the case of . . . accessory after the fact, the conduct for which the defendant is accountable includes *all conduct relevant to determining the offense level for the underlying offense* that was known, or reasonably should have been known, by the defendant." U.S.S.G. § 1B1.3, application note 10 (emphasis added). As a factual matter, there was no clear error in finding that Landa-Rivera knew or should have known of these characteristics of the robbery. In fact, the record shows that Landa-Rivera recounted the details of the robbery to Nevarez-Marrero and Diaz-Nevarro.

Landa-Rivera's second argument is that there was insufficient evidence to support a finding that he knew or

should have known that the property of a financial institution was taken, *see* U.S.S.G. § 2B3.1(b)(1), and that the total losses were over $5 million, *see* U.S.S.G. § 2B3.1(b)(7)(H). There was no error. Landa-Rivera told Nevarez-Marrero that over $5 million had been stolen; there was ample evidence that much of the money came from banks – Banco Popular and Banco Santander in particular; and it was reasonable for the trial judge to conclude that Landa-Rivera knew or should have known this information.

III.

The convictions and sentences of defendants Mojica-Baez, Reyes-Hernandez, Cartagena-Merced, and Ramos-Cartagena are *affirmed*. Defendant Landa-Rivera's conviction is *affirmed*, but his sentence is *vacated* and *remanded* for resentencing in accordance with this opinion.

So ordered.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 98-2350

UNITED STATES,

Appellee,

v.

JOSUE G. REYES-HERNANDEZ, a/k/a CHIETO,

Defendant-Appellant.

Before

Torruella, *Chief Judge*,
Selya, Boudin, Stahl, Lynch and Lipez, *Circuit Judges*
and Gorton,* *District Judge*.

ORDER OF COURT

Entered: November 2, 2000

(Filed Nov. 6, 2000)

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

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* Of the District of Massachusetts, sitting by designation.

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

Phoebe Morse, Clerk.

By _____
Chief Deputy Clerk.

[cc: Messrs: Roman and Faeber]

Supreme Court, U.S.
FILED
MAY 4 2000
OFFICE OF THE CLERK

(2)

Nos. 00-1256, 00-8464 and 00-8634

In the Supreme Court of the United States

JOSUE G. REYES-HERNANDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN ALEXIS MOJICA-BAEZ, PETITIONER

v.

UNITED STATES OF AMERICA

JOSE RAMOS-CARTAGENA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record
JOHN C. KEENEY
Acting Assistant Attorney General
JOSEPH C. WYDERKO
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

SUPP

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in reopening the government's case after petitioners moved for judgments of acquittal in order to allow the government to present evidence that deposits of the banks petitioners robbed were federally insured.

2. Whether the court of appeals should have accorded petitioners relief, under the plain-error standard, from the ten-year sentences imposed on them under 18 U.S.C. 924(c)(1) (1994), because there was no allegation in the indictment and no finding by the jury that petitioners used semiautomatic assault weapons during and in relation to their crimes of violence.

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In the Supreme Court of the United States

No. 00-1256

JOSUE G. REYES-HERNANDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

No. 00-8464

JOHN ALEXIS MOJICA-BAEZ, PETITIONER

v.

UNITED STATES OF AMERICA

No. 00-8634

JOSE RAMOS-CARTAGENA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (00-8634 Pet. App. 12-51, 53-55[1]) is reported at 229 F.3d 292.

[1] Unless otherwise noted, we cite to the appendix to the petition in No. 00-8634, which includes both the original slip opinion

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2000. A petition for rehearing was denied on November 2, 2000 (Pet. App. 52). The petition for a writ of certiorari in No. 00-8464 was filed on January 30, 2001, and the petitions in Nos. 00-1256 and 00-8634 were filed on January 31, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Puerto Rico, each petitioner was convicted of two counts of armed robbery of money and checks belonging to a federally insured bank, in violation of 18 U.S.C. 2113(a) and (d); one count of assault with intent to rob money belonging to the United States by use of a dangerous weapon, in violation of 18 U.S.C. 2114(a); one count of entering a vehicle containing interstate shipments of money and checks with intent to commit larceny, in violation of 18 U.S.C. 2117; and one count of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1) (1994). Petitioner Reyes-Hernandez was sentenced to 308 months' imprisonment, to be followed by five years of supervised release. Petitioner Mojica-Baez was sentenced to 330 months' imprisonment, to be followed by five years of supervised release. Petitioner Ramos-Cartagena was sentenced to 355 months' imprisonment, to be followed by five years of supervised release. The court of appeals affirmed.

(Pet. App. 12-51) and an "Errata Sheet" issued by the court (*id.* at 53-55). The appendix in No. 00-1256 does not incorporate the changes directed by the errata sheet, and the appendix in No. 00-8464 incorporates them incorrectly (and misnumbers the footnotes).

1. On May 13, 1997, petitioners and co-defendant Nelson Cartagena-Merced robbed the armored car depot of Loomis, Fargo & Co. in Ponce, Puerto Rico. Three of the robbers, who were armed with rifles and disguised in security guard uniforms, took the Loomis Fargo guards captive as the guards returned to the depot in their armored vehicles after their daily collection runs. The fourth robber stood watch outside with a walkie-talkie. The robbers escaped with $5.5 million, which included money and checks collected from two federally insured banks, Banco Popular and Banco Santander, and from a United States Postal Service branch. Pet. App. 15-17; Gov't C.A. Br. 13-16.

During the robbery, the robbers threatened the guards and boasted how powerful their weapons were. The guards heard the robbers say that "[t]his AK-47 that I have here can actually punch through 12 guys," "[t]his thing can even go through cement," and "[t]his is an AK-47, and if I shoot you with this, I'll rip you up." One guard recognized a weapon as an AK-47, and another guard described the firearms carried by the robbers as "assault weapons, big weapons." Pet. App. 17, 40; Gov't C.A. Br. 14; Gov't Supp. C.A. Br. 11.

Based upon information from a confidential informant, FBI agents obtained search warrants for petitioners' houses. In petitioner Mojica-Baez's house, the agents found AK-47 ammunition and part of the barrel of an AR-15 assault rifle. In petitioner Ramos-Cartagena's house, the agents found AK-47 ammunition and a photograph of Ramos-Cartagena holding an AK-47. At trial, an FBI agent testified that an AK-47 round is capable of penetrating cement, and that an AK-47 can operate as either a semiautomatic or a fully automatic weapon. Pet. App. 19-20, 40; Gov't C.A. Br. 17; Gov't Supp. C.A. Br. 11.

2. Counts 1 and 2 of the indictment charged petitioners with armed robbery of money and checks belonging to federally insured banks, in violation of 18 U.S.C. 2113(a) and (d). Count 1 identified the bank as "Banco Popular, a bank insured by the Federal [Deposit Insurance] Corporation" (FDIC), and Count 2 identified the bank as "Banco Santander, a bank insured by the Federal [Deposit Insurance] Corporation." Pet. App. 1-2. After the government rested its case at trial, petitioners moved for judgments of acquittal with respect to those two counts on the ground that the government had failed to prove, as an element required by 18 U.S.C. 2113, that the banks were insured by the FDIC. In response, the government asked the district court to reopen the case to allow it to present such evidence or, alternatively, to take judicial notice that both banks were federally insured. Pet. App. 21-22; Gov't C.A. Br. 22-23.

The district court indicated its inclination to reopen the case and proposed that the parties stipulate to the fact that the two banks were federally insured. Petitioners and the government entered into the stipulation, without prejudice to petitioners' right to raise the issue on appeal, and the stipulation was read to the jury. Pet. App. 22; Gov't C.A. Br. 23-24.

3. Count 5 of the indictment charged that petitioners "use[d] and carr[ied] a firearm, as defined in Title 18, *United States Code*, Section 921(a)(3), during and in relation to a crime of violence * * *, specifically robbery of property belonging to a bank * * *," in violation of 18 U.S.C. 924(c)(1) (1994). Pet. App. 4. At trial, the district court instructed the jury:

> For you to find the defendants guilty of this crime you must be convinced that the Government has

> proven each of these things beyond a reasonable doubt.
>
> First, that the defendants committed the crime of armed or aggravated bank robbery.
>
> And that, second, during and in relation to the commission of that crime the defendants knowingly used or carried firearms. The word knowingly means that act was voluntary and intentional and not because of mistake or accident.
>
> I totally forgot to define a firearm in the [written] charge, but I will define it for you now. A firearm is any typical weapon referred to as a firearm, as long as it's capable of expelling a projectile.

Gov't Supp. C.A. Br. 9-10; Pet. App. 78. The jury found all three petitioners guilty.

At the sentencing hearing of petitioner Reyes-Hernandez, the district court found that the firearms used during the robbery were semiautomatic assault weapons and, therefore, that petitioners were subject to mandatory consecutive ten-year sentences on Count 5 under 18 U.S.C. 924(c)(1) (1994).[2] 10/28/98 Tr. 6-10;

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[2] At the time of petitioners' offenses, 18 U.S.C. 924(c)(1) (1994) provided in pertinent part:

> Whoever, during and in relation to any crime of violence * * * uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence * * * be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped

Gov't Supp. C.A. Br. 12-14. Petitioner Reyes-Hernandez objected to the ten-year sentence on the ground that the evidence at trial was insufficient to show that the firearms were semiautomatic assault weapons. 10/28/98 Tr. 6-10; Pet. App. 37-39 & n.8. The court overruled the objection:

> The weight of the evidence is that—the evidence is that the individuals who robbed that facility had assault rifles with them of AK-47 type. That type. And that is enough for me to rely on and say that the penalty has to be a consecutive, fixed term of ten years.

10/28/98 Tr. 9. The court sentenced petitioner Reyes-Hernandez to a ten-year sentence on Count 5, to run consecutively to his 188-month sentence on the other counts. The court similarly sentenced petitioners Mojica-Baez and Ramos-Cartagena to ten-year sentences on Count 5, to run consecutively to their respective 210-month and 235-month sentences on the other counts. Gov't Supp. C.A. Br. 13-14.

4. The court of appeals affirmed petitioners' convictions and sentences. Pet. App. 12-51, 53-55.[3] As

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with a firearm silencer or firearm muffler, to imprisonment for thirty years.

The term "semiautomatic assault weapon" was defined in 18 U.S.C. 921(a)(30)(A)(i) (1994) to include:

> (A) any of the firearms, or copies or duplicates of the firearms in any caliber, known as—
>
> (i) Norinco, Mitchell, and Poly Technologies Avtomat Kalashnikovs (all models)[.]

[3] The court addressed and rejected several claims that petitioners do not renew in this Court. See Pet. App. 12-26. The court also affirmed the conviction of petitioners' co-defendant Rodolfo

relevant here, the court rejected the claim by petitioners Reyes-Hernandez and Ramos-Cartagena that they were entitled to acquittal on the bank robbery counts, because the district court indicated its willingness to reopen the government's case to allow proof that Banco Popular and Banco Santander were insured by the FDIC, and urged the parties to enter into a stipulation on that point. *Id.* at 21-22. The court of appeals concluded that "[t]here was no serious dispute that the banks were federally insured, and the government's lapse was recognized in time." *Id.* at 22. The court likewise rejected petitioner Ramos-Cartagena's claim that he was entitled to acquittal on the assault count because the evidence was insufficient to show that they robbed money belonging to the United States Postal Service. *Id.* at 23.

While petitioners' appeals were pending, this Court held in *Castillo* v. *United States*, 530 U.S. 120, 131 (2000), that "Congress intended the firearm type-related words it used in [18 U.S.C. 924(c)(1) (1988 & Supp. V 1993)] to refer to an element of a separate, aggravated crime." As a result, under that version of the statute, "the indictment must identify the firearm type and a jury must find that element proved beyond a reasonable doubt" in order for a defendant to receive a sentence in excess of the five-year term provided in the statute for using or carrying any "firearm." *Id.* at 123.[4]

Landa-Rivera, but vacated his sentence and remanded for resentencing. *Id.* at 49-51, 55.

[4] The version of Section 924(c) at issue in *Castillo* did not include semiautomatic assault weapons among the types of firearms requiring a ten-year consecutive sentence. See 530 U.S. at 131-132 (appendix to opinion). Congress added semiautomatic assault weapons to the list of firearms meriting a ten-year sentence in 1994. Violent Crime Control and Law Enforcement Act of

The court of appeals directed the parties to file supplemental briefs in this case addressing the effect of *Castillo* on petitioners' sentences. Pet. App. 15, 38. It then considered the effect of *Castillo*, as well as of this Court's decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), which was announced after the parties' supplemental briefs were filed, see Pet. App. 38, 54, taking note that no claim based on the legal theories of those cases had been raised at sentencing.[5]

1994, Pub. L. No. 103-322, § 110102(c), 108 Stat. 1998. That amendment did not change the structure of the statute, however, in any way that affects the applicability of *Castillo*'s analysis in this case. See Gov't Supp. C.A. Br. 17 (acknowledging that *Castillo* applies to this case).

The court of appeals' discussion incorrectly refers to the version of Section 924(c)(1) in effect at the time of appeal, rather than the version in effect at the time of petitioners' offenses (May 13, 1997), and under which they were convicted and sentenced. See Pet. App. 26 (quoting later version); *id.* at 40-41, 46 (referring to subsection (B) of Section 924(c)(1), which did not exist under earlier version). Congress substantially revised Section 924(c) effective November 13, 1998, in ways that affect any *Castillo* analysis (for example, by changing mandatory fixed sentences to mandatory minimum sentences, with an implicit statutory maximum of life imprisonment for any violation). Act of Nov. 13, 1998, Pub. L. No. 105-386, 112 Stat. 3469; see 18 U.S.C. 924(c)(1) (Supp. V 1999) (prescribing sentences of "not less than" specified numbers of years, depending on various circumstances). The court's references to the later version of Section 924(c) do not, however, affect the analysis in the court's opinion, which proceeds on the basis that, in light of *Castillo*, firearm type was an element of the Section 924(c) offense for which petitioners were sentenced.

[5] The government's supplemental brief, without undertaking a plain-error analysis, concluded that petitioners' sentences should be vacated and the case remanded so they could be sentenced to five-year terms on their Section 924(c) convictions. Gov't Supp. C.A. Br. 19.

In its decision, the court concluded that claims under *Castillo* were subject to review only for plain error, because "[t]he only objections at sentencing regarding the § 924(c)(1) conviction did not encompass *Castillo*'s distinction between sentencing factors and elements," and "the arguments in the initial briefs on appeal [were not] addressed to this point." Pet. App. 38-39. The court observed (*id.* at 39) that "[p]lain error review requires four showings: that there was error; that it was plain; that the error affected substantial rights; and that the error seriously affected the fairness, integrity or public reputation of judicial proceedings." The government acknowledged that, under *Castillo*, firearm type should have been charged in the indictment and proved to the jury before it was used to enhance petitioners' sentences, see Gov't Supp. C.A. Br. 16-17, and the court held that the threshold requirements for relief were met because "there was error, and it was plain, at least by the time of argument on the direct appeal." Pet. App. 39 (citing *Johnson* v. *United States*, 520 U.S. 461, 468 (1997)). The court noted, however, that there was uncontradicted trial evidence showing that petitioners used an AK-47 assault weapon during their robbery. *Id.* at 40; see also *id.* at 49 ("There is no question that the petit jury in this case would have found that [petitioners] used at least one AK-47."). In light of that evidence, the court explained, petitioners were not entitled to relief from the trial court's error in not submitting the question of firearm type to the jury, because petitioners had not shown that the error affected their substantial rights (by changing the outcome of the proceeding) or resulted in any "miscarriage of justice." *Id.* at 39-40.

The court then considered the error in imposing enhanced sentences when firearm type had not been

alleged in the indictment. Pet. App. 40-49, 54-55.[6] The court rejected petitioners' argument that "such indictment errors are not subject to harmless or plain error analysis." *Id.* at 41. The court agreed with petitioners that Rule 12(b)(2) of the Federal Rules of Criminal Procedure allows a defendant to raise certain indictment claims for the first time on appeal, Pet. App. 43, and that the indictment in this case was arguably deficient, *id.* at 43-44, but it held that the error in this case was "not of [the same] dimension" as the sorts of "structural error" that have been held to require reversal without any showing of prejudice, *id.* at 44-45. The court noted, moreover, that "the integrity of the judicial system" was not implicated, because "[t]he reason the indictment in this case did not specify that a semiautomatic assault weapon or AK-47 had been used in the robbery was that circuit precedent at the time did not require it." *Id.* at 45; see *id.* at 45-46 ("It is one thing to vacate a conviction or sentence where the prosecutor failed to indict in accordance with the current state of the law. It is quite another thing to vacate a conviction or sentence based on an indictment that was entirely proper at the time.").

The court acknowledged that "[t]here are some serious harms * * * that can emerge from flawed indictments." Pet. App. 46. It emphasized, however, that petitioners "[had] not argued on appeal that they lacked fair notice" of the charges against them, and it distinguished cases addressing different indictment

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[6] The court noted at the outset of its discussion of this point that "*Castillo* and *Apprendi* are trial-error cases and do not tell us what to do [with] claims of indictment error based on their holdings, particularly where the issue was not raised at trial." Pet. App. 54.

issues. *Id.* at 46-47, 54-55 & n.1. The court found guidance, instead, in this Court's decision in *Neder* v. *United States*, 527 U.S. 1 (1999), which "held that a jury instruction 'that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence' and is, therefore, subject to harmless error review." Pet. App. 47 (quoting *Neder*, 527 U.S. at 9). The court reasoned that the distinction between "the failure to submit an element of an offense to the petit jury" and the "failure to present an element to the grand jury to secure an indictment" was not significant "where the indictment provided the defendant with fair notice of the charges against him." *Ibid.* The court also concluded that the omission of an allegation of weapon type in the indictment in this case "did not necessarily render the indictment unfair or make it an unreliable vehicle with which to commence the proceedings in this case." *Id.* at 49. The court accordingly declined to require resentencing or reindictment in this case. See *id.* at 41 n.9, 49, 51.

ARGUMENT

1. Petitioners Reyes-Hernandez (00-1256 Pet. 4-6) and Ramos-Cartagena (00-8634 Pet. 7-11) contend that the district court erred in denying their motions for judgments of acquittal because the government initially failed to present evidence that the two bank victims, Banco Popular and Banco Santander, were insured by the FDIC. When petitioners properly raised that issue in their motions, however, the district court indicated its willingness to reopen the government's case, and the parties then stipulated that the two banks were federally insured. The government's omission was therefore

promptly corrected, and petitioners have no just cause for complaint.

A district court has discretion to reopen the government's case to allow correction of such an omission. See, *e.g.*, *United States* v. *Rouse*, 111 F.3d 561, 573 (8th Cir.), cert. denied, 522 U.S. 905 (1997); *United States* v. *Leslie*, 103 F.3d 1093, 1104 (2d Cir.), cert. denied, 520 U.S. 1220 (1997); *United States* v. *Blankenship*, 775 F.2d 735, 740-741 (6th Cir. 1985); *United States* v. *Hinderman*, 625 F.2d 994, 996 (10th Cir. 1980); cf. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 331 (1971) ("[A] motion to reopen to submit additional proof is addressed to [the trial judge's] sound discretion."). Petitioners cite no decision holding to the contrary. To the extent that petitioners contend that the district court abused its discretion in allowing a limited reopening in this case, that fact-bound claim was properly rejected by the court of appeals, Pet. App. 21-22, and does not warrant review by this Court.[7]

2. Petitioners contend (00-1256 Pet. 7-9; 00-8464 Pet. 4-14; 00-8634 Pet. 11-26) that the ten-year sentences imposed by the district court under 18 U.S.C. 924(c)(1) (1994) are invalid under *Castillo* v. *United States*, 530 U.S. 120 (2000), and *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). In *Castillo* the Court held, as a matter of statutory construction, that Section 924(c)(1), as in effect before its amendment in 1998, created a base offense involving the use or carrying of any firearm and

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[7] Petitioner Reyes-Hernandez also appears to argue (00-1256 Pet. 5) that the government failed to prove that the guards whom petitioners assaulted had charge of money belonging to the United States or that any vehicle they entered contained an interstate shipment. The court of appeals expressly rejected the ownership argument, Pet. App. 23, and neither claim presents a legal issue that merits review by this Court.

"separate, aggravated crime[s]" involving the use or carrying of certain specified firearms, such as machine-guns. 530 U.S. at 131; see *id.* at 121, 123-124. In *Apprendi* the Court held, as a matter of constitutional law, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490.

a. Under the version of Section 924(c)(1) in effect at the time of petitioners' offenses, the penalty authorized for using or carrying any firearm during and in relation to a crime of violence was five years' imprisonment. 18 U.S.C. 924(c)(1) (1994). *Castillo* held that in order to impose the ten-year sentence authorized in Section 924(c)(1) for violations involving certain types of firearms, "the indictment must identify the firearm type and a jury must find that element proved beyond a reasonable doubt." 530 U.S. at 123. In this case, petitioners were sentenced above the five-year maximum sentence authorized for the base offense, but the indictment did not allege that petitioners used or carried a semiautomatic assault weapon, and the jury was not asked to find that the offense involved such a weapon. Imposition of the ten-year sentences was therefore error, both under *Castillo* and under *Apprendi*.

Petitioners did not raise claims of the sort upheld in *Castillo* and *Apprendi* at trial, at sentencing in the district court, or in their initial briefs in the court of appeals. See Pet. App. 38 & n.8. Those claims may therefore be reviewed, at most, for plain error. Fed. R. Crim. P. 52(b); *Johnson* v. *United States*, 520 U.S. 461 (1997); *United States* v. *Olano*, 507 U.S. 725 (1993). At least with respect to *Apprendi*'s constitutional holding,

the error in imposing an enhanced sentence on the basis of a finding made only by the district court at sentencing is "plain," in that it became "clear" or "obvious" after this Court's decision in *Apprendi*. See *Johnson*, 520 U.S. at 467-468 (when "the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration"); see also Pet. App. 39 (concluding that *Castillo* error was "plain"). Even with respect to a "plain" error, however, petitioners are not entitled to relief unless they can also demonstrate that the error both "affect[ed] substantial rights" and "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 467 (quoting *Olano*, 507 U.S. at 732).

b. The court of appeals correctly held that petitioners could not make those showings with respect to the district court's failure to submit the question of firearm type to the jury. Pet. App. 39-40. In *Johnson*, 520 U.S. at 470, this Court held that where the evidence that would have supported a finding on an element of an offense was "overwhelming" and "essentially uncontroverted," failure to submit that element to the jury did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. Since *Apprendi*, courts of appeals have applied the same principle in conducting plain-error review of cases in which the jury was not asked to find a fact necessary to support the imposition of an enhanced sentence under the federal drug statutes. See, *e.g.*, *United States* v. *Mietus*, 237 F.3d 866, 875 (7th Cir. 2001) (no serious effect on fairness, and therefore no relief for plain *Apprendi* error, where evidence as to drug quantity was overwhelming); *United States* v. *Keeling*, 235 F.3d 533, 539-540 (10th Cir. 2000) (same). And this Court relied in

part on *Johnson* in deciding *Neder* v. *United States*, 527 U.S. 1, 9, 17 (1999), in which the Court held that "where a reviewing court concludes beyond a reasonable doubt that [an] omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, [an] erroneous instruction [omitting a requirement that the jury find that element] is properly found to be harmless."

In this case, the undisputed trial evidence showed that petitioners used AK-47 assault rifles during their robbery, and the court of appeals concluded that there was "no question" that the jury, if it had been asked to do so, "would have found that [petitioners] used at least one AK-47." Pet. App. 49; see *id.* at 40 (recounting evidence on point). The court correctly held that, in light of that conclusion, petitioners could not establish any entitlement to relief under the plain-error standard "simply by showing that an element of an offense was not submitted to the jury." *Id.* at 39.

c. The court of appeals also correctly held that the plain-error standard applies to petitioners' claim that their enhanced sentences should be vacated because the aggravating factor justifying those sentences was not alleged in the indictment.[8] As this Court made clear in

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[8] There is no question after *Castillo* that firearm type was an element of an aggravated offense under former Section 924(c)(1), and that use of a semiautomatic assault weapon should therefore have been alleged in the indictment as a predicate to imposing ten-year sentences on petitioners. See 530 U.S. at 123. The constitutional holding in *Apprendi*, by contrast, arose out of a state prosecution, and this Court did not hold that any fact that might increase the statutory maximum penalty for a crime must be alleged in a federal indictment. See 530 U.S. at 477 n.3. Because the federal right to grand-jury indictment does not extend to state

Johnson, 520 U.S. at 466, all claimed errors in federal criminal trials, regardless of their nature or seriousness, are subject to the plain-error rules set out in Rule 52(b) of the Federal Rules of Criminal Procedure when the defendant does not make a timely objection to the alleged error in the district court.[9] "'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as in civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *Olano*, 507 U.S. at 731 (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). Indeed, even a conclusion that a particular type of error is "structural," or "so serious as to defy *harmless*-error analysis," suggests only that such errors may always "affec[t] substantial rights," thus satisfying the third of the four requirements for plain-error relief. See *Johnson*, 520 U.S. at 468-469 (emphasis added). Under the fourth requirement, a prejudicial error (including a "structural" one) that would clearly be grounds for relief if properly preserved is *not* a proper ground for relief if it was *not* preserved, unless it also "seriously affect[s] the fairness, integrity or

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prosecutions, uniform application of *Apprendi*'s principles would not dictate any particular form in which constitutionally adequate notice must be provided.

[9] In *United States* v. *Vonn*, cert. granted, No. 00-973 (Feb. 26, 2001), one of the questions presented is whether a district court's deviation from the advice required by Rule 11(c)(3) of the Federal Rules of Criminal Procedure is subject to plain-error, rather than harmless-error, review on appeal when the defendant fails to preserve the claim of error in the district court. Because this case involves a claim of sentencing error rather than a guilty plea followed by a claim of Rule 11 error, *Vonn* has no bearing on this case.

public reputation of judicial proceedings." *Id.* at 469-470 (quoting *Olano*, 507 U.S. at 736).

The provisions of Rule 12(b) do not vary the analysis with respect to indictment errors like the one claimed here. That Rule provides in the main that a defendant "must" raise *before trial* all "[d]efenses and objections based on defects in the indictment." Fed. R. Crim. P. 12(b)(2). It provides a narrow exception for claims that the indictment "fails to show jurisdiction in the court or to charge an offense," which "shall be noticed by the court at any time during the pendency of the proceedings." *Ibid.* Petitioners cannot claim that the district court lacked jurisdiction to try them under the indictment in this case, or that the indictment "fails * * * to charge an offense." See Pet. App. 41 n.9. They claim only that the indictment did not allege a particular aggravating fact concerning the offense, and that in light of that failure they should have been sentenced for the base offense, not the aggravated offense. Petitioners' failure to raise any such claim at sentencing, see *id.* at 38 & n.8, requires that appellate consideration be limited to review for plain error, as required by Rule 52(b).[10]

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[10] Some courts have suggested that Rule 12(b)(2) applies to a claim that the indictment charged a lesser offense (rather than no offense), and allows a court to consider such a claim de novo whenever it is first raised. See *United States* v. *Gama-Bastidas*, 222 F.3d 779, 785 & nn.3, 4 (10th Cir. 2000) (claim that indictment charged misdemeanor possession of cocaine, rather than the felony of possession of cocaine with the intent to distribute it); *United States* v. *Fitzgerald*, 89 F.3d 218, 221 n.1 (5th Cir.), cert. denied, 519 U.S. 987 (1996). But nothing in the Rule requires that such an objection be reviewed de novo, no matter when raised. See *United States* v. *Stein*, 233 F.3d 6, 22 (1st Cir. 2000); *United States* v. *Perez*, 67 F.3d 1371, 1376 (9th Cir. 1995) (applying plain-error review to a challenge to the adequacy of an indictment), opinion

In *Johnson* the Court held that failure to submit an element of an offense to the petit jury was "plain" error, which the Court assumed had "affec[ted] substantial rights" (and might be "structural"). 520 U.S. at 467-469. The Court then held that the error did not justify relief when raised for the first time on appeal, because existence of the element had been "essentially uncontroverted at trial" (the defendant had made only a passing objection to the sufficiency of the evidence), and the evidence supporting its existence was "overwhelming." *Id.* at 470. Later, in *Neder*, the Court held that the same error was not, in fact, "structural," because it would not "*necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." 527 U.S. at 9. Even a preserved claim was therefore subject to *harmless*-error analysis—and the error was harmless where it was "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id.* at 18.

The court of appeals relied on *Johnson* and *Neder* to hold that petitioners were not entitled to relief, under the circumstances here, from enhanced sentences based on an aggravating factor that was omitted from the indictment. See Pet. App. 45-49. As the court noted (*id.* at 45-46), at the time of indictment, circuit precedent did not require an allegation of weapon type as a predicate for later enhancement of a defendant's sentence. Petitioners did not object when the government sought such enhancement at sentencing, or complain then or on appeal that they lacked fair notice of that possibility. *Id.* at 46-47. The trial evidence concerning

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withdrawn in part on other grounds, 116 F.3d 840 (1997); *United States* v. *Murphy*, 762 F.2d 1151, 1155 (1st Cir. 1985).

petitioners' use of AK-47 assault weapons was, as in *Johnson*, "essentially uncontroverted." 520 U.S. at 470; compare *id.* at 470 n.2 with Pet. App. 38 n.8; see Pet. App. 40 (reviewing evidence, and noting that petitioners' briefs on appeal did not "address the key question: whether, given the evidence actually introduced as to the weapons used, there was any prejudice from the failure to have submitted the question to the jury"). And the court of appeals, having reviewed that evidence (Pet. App. 40), was persuaded that there was "no question that the petit jury in this case would have found that [petitioners] used at least one AK-47." *Id.* at 49. Under those circumstances, the court concluded (*id.* at 45), plain-error relief was not necessary to "safeguard[] fair trials," to "vindicat[e] compelling constitutional policies," or to preserve "the integrity of the judicial system." On the basis of those conclusions, the court properly denied plain-error relief under *Johnson*. See also *United States* v. *Nance*, 236 F.3d 820, 825-826 (7th Cir. 2000) (refusing relief for plain *Apprendi* error in not alleging or proving drug quantity, where it was clear that defendant would have received the same enhanced sentence even if there had been "a properly worded indictment and a properly instructed jury," because "i[f] th[e] jury was going to convict [the defendant] at all—which it plainly did—there is simply no way on this record that it could have failed to find" that the offense involved an enhancing quantity of drugs); *United States* v. *Pease*, 240 F.3d 938, 943-944 (11th Cir. 2001) (same, where defendant admitted in plea agreement and colloquy that he dealt in more than required threshold quantity of drugs); *United States* v. *Wright*, No. 00-1034 (8th Cir. Apr. 27, 2001), slip op. 2-3 (where defendant was sentenced for carjacking resulting in serious bodily injury, in violation of 18 U.S.C.

2119(2), without an allegation of such injury in the indictment (see *Jones* v. *United States*, 526 U.S. 227 (1999)), court remands for harmless-error analysis, stating that "testimony by [the victim] at resentencing might provide overwhelming evidence that she in fact suffered serious bodily injury, making the defect in Wright's indictment harmless error").

d. The court of appeals' holding does not conflict with *Stirone* v. *United States*, 361 U.S. 212 (1960), in which the proof and instructions at trial might have allowed the petit jury to find the existence of a jurisdictional element on a ground never considered by the grand jury. The petit jury's findings concerning petitioners' offenses confirmed all the allegations of the grand jury, and those allegations were by themselves fully sufficient to charge an offense against the United States. The error in this case occurred when the district court sentenced petitioners for an aggravated form of that offense (notably, the "same offense" under the standard normally used for purposes of Double Jeopardy analysis, see *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932)), where the aggravating fact was not considered an element of a separate offense at the time of indictment, trial, or sentencing, and therefore was not included in the indictment or submitted to the jury. The question presented here, moreover, is not whether imposing that sentence was error. Cf. *United States* v. *Miller*, 471 U.S. 130, 140-145 (1985) (reaffirming *Ex parte Bain*, 121 U.S. 1 (1887), to the extent it held that "a defendant cannot be convicted of an offense different from that which was included in the indictment," 471 U.S. at 142). Nor is it whether such an error may be held harmless when a proper objection is made. Cf. *Stirone*, 361 U.S. at 217-218. The question here is whether petitioners' unpreserved claim of error

entitled them to relief, on appeal, under the plain-error standard. *Stirone* did not address such an issue.

For much the same reasons this case is also unlike *United States* v. *Prentiss*, 206 F.3d 960 (2000), in which a panel of the Tenth Circuit held that an indictment for violation of a federal law extended to Indian country under 18 U.S.C. 1152 must, as a jurisdictional matter, allege that the crime was committed by an Indian against a non-Indian (or vice versa), and (206 F.3d at 974-977) that absence of such an allegation from the indictment could not be harmless error. See Pet. App. 42-43 (discussing *Prentiss*). In any event, the Tenth Circuit has granted rehearing en banc to reconsider the *Prentiss* panel's conclusions. See Order of June 19, 2000, No. 98-2040 (10th Cir.) (reargued Sept. 26, 2000).

The decision in this case does conflict with the Second Circuit's decision in *United States* v. *Tran*, 234 F.3d 798 (2000), which sustained a claim very similar to that advanced by petitioners, in a case also involving enhanced sentences under 18 U.S.C. 924(c)(1) (1994).[11] See 00-1256 Pet. 9; 00-8464 Pet. 7-8. *Tran* held that "plain error review is inappropriate where [a] defect in the indictment is jurisdictional," 234 F.3d at 806, and concluded that "the district court did not have jurisdiction to enter a conviction or impose a sentence for an offense not charged in the indictment, namely, the 'separate, aggravated crime' of using or carrying a short-barreled rifle," *id.* at 808 (quoting *Castillo*, 530 U.S. at 131). That conflict does not, however, warrant review in this case.

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[11] Like petitioners, the defendants in *Tran* were convicted and sentenced under the pre-1998 version of Section 924(c)(1). See 234 F.3d at 802 n.1.

Although the United States did not seek en banc rehearing in *Tran*, we have suggested to the Second Circuit in a different case that *Tran*'s errors warrant en banc correction. See Gov't Supp. Reply Br. 13-18, *United States* v. *Greer*, No. 99-1072(L) (2d Cir.) (filed Mar. 2, 2001). Recently, the Second Circuit sua sponte ordered en banc rehearing in *United States* v. *Thomas*, No. 98-1051, 2000 WL 33281680 (2d Cir. Apr. 20, 2001), which this Court remanded to the court of appeals for reconsideration in light of *Apprendi*. See 121 S. Ct. 749 (2001). The court's order, which is reprinted as an appendix to this brief, indicates that the court will consider whether an enhanced sentence imposed on defendant Thomas under 21 U.S.C. 841(b), in the absence of any allegation of drug quantity in the indictment and any finding concerning quantity by the petit jury, should be allowed to stand in light of *Apprendi* and *Tran*. App., *infra*, 2a. The order specifies that the parties are to address, among other issues, the following question: "Should this Court's analysis in the instant case be governed or influenced by [*Tran*], and, if so, is *Tran*'s reasoning sound?" *Id.* at 5a. It is, accordingly, not clear whether *Tran*'s holdings will continue to stand as controlling authority in conflict with the decision below.

The decision below is also in significant tension with the decision of the Tenth Circuit in *United States* v. *Jackson*, 240 F.3d 1245, 1247-1249 (2001), which holds that plain-error review does not apply to a defendant's challenge to her sentence where the indictment did not include any allegation concerning drug quantity, and the sentence exceeds the maximum authorized by statute without a quantity finding. The Tenth Circuit, however, has recently called for a response to the government's petition for rehearing or rehearing en

banc in *Jackson*.[12] We note, further, that the precise question presented by petitioners is likely to arise as well in a case now pending in the Eleventh Circuit, which that court has sua sponte ordered reheard in light of this Court's decision in *Castillo*. See *United States* v. *Riley*, 232 F.3d 844, vacating in part, 211 F.3d 1207 (2000), cert. denied, 121 S. Ct. 880 (2001).

In view of these continuing developments in the lower courts, the question petitioners seek to present is not yet ripe for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
JOSEPH C. WYDERKO
Attorney

MAY 2001

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[12] As noted above, the same court is also reconsidering en banc the panel's holding in *Prentiss*.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2000

No. 98-1051

UNITED STATES OF AMERICA, APPELLEE

v.

RAMSE THOMAS, a/k/a ROCK, DEFENDANT-APPELLANT

[Filed: Apr. 20, 2001]

MEMORANDUM AND ORDER

BEFORE:

WALKER, Chief Judge, KEARSE, JACOBS, LEVAL, CALABRESI, CABRANES, PARKER, STRAUB, POOLER, SACK, SOTOMAYOR, and KATZMANN, Circuit Judges

On remand from the United States Supreme Court, *see Thomas v. United States*, 121 S. Ct. 749 (2001), defendant Ramse Thomas argues that the sentence imposed by the United States District Court for the Northern District of New York (Thomas J. McAvoy, *Chief Judge*), pursuant to 21 U.S.C. § 841(b)(1)(A), is unconstitutional in light of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000).

A poll of the judges in regular active service having been requested and taken and a majority of the active judges of the court having voted to rehear the appeal in banc, **IT IS HEREBY ORDERED** that the appeal be reheard in banc since this case raises questions of exceptional importance that will affect the administration of criminal justice in our Circuit, *see* Fed. R. App. P. 35(a). The in banc panel will consist of the active judges of the court. *See* 28 U.S.C. § 46(c). It is being convened to consider whether, following the Supreme Court's decision in *Apprendi v. New Jersey*, and our decision in *United States v. Tran*, 234 F.3d 798 (2d Cir. 2000), the district court was empowered to impose an enhanced sentence on Thomas based on its findings concerning the quantity of drugs involved in his offense.

The facts and proceedings relevant to the instant appeal are as follows: In 1994, a grand jury in the Northern District of New York returned an indictment charging, *inter alia*, that Thomas and others "did knowingly, willfully and unlawfully combine, conspire, confederate and agree among themselves and with others, to possess with intent to distribute and to distribute a quantity of cocaine, a Schedule II controlled substance and a quantity of cocaine base, also known as 'crack' cocaine, a Schedule II controlled substance, in violation of Title 21, United States Code, § 841(a)(1). In violation of Title 21, United States Code, § 846." The indictment nowhere alleges that the charged crimes involved any particular quantity of drugs.

Thomas and his co-defendants were convicted, following a jury trial, on February 27, 1995. *See United States v. Thomas*, 116 F.3d 606, 612 (2d Cir. 1997).

They appealed, and we vacated their convictions and remanded the case for retrial based on the District Court's improper dismissal of a juror. *See id.* at 625. In January 1998, following a second jury trial, Thomas was again convicted of the conspiracy charge. *See United States v. Thomas*, 204 F.3d 381, 382 (2d Cir. 2000) ("*Thomas II*").

In conformity with standard practices adopted by district courts following the promulgation of the U.S. Sentencing Guidelines, the Presentence Investigation Report on Thomas prepared by the U.S. Probation Office recommended that the sentencing judge enter the following findings regarding the quantities of narcotics attributable to Thomas: 24.479 kilograms of cocaine and 1.826 kilograms of crack cocaine. After considering the record before it, the district judge found Thomas responsible for 12.9 kilograms of cocaine and 1.2 kilograms of crack cocaine. Under 21 U.S.C. § 841(b)(1)(A), these quantities resulted in a sentencing range of ten years' to life imprisonment. (By contrast, had the judge not made findings concerning drug quantity, or had he found that the amount involved was less than 500 grams of cocaine and 5 grams of crack cocaine, he could have imposed a sentence no higher than the statutory maximum of twenty years' imprisonment for an offense involving either an unspecified quantity of cocaine or crack cocaine, or quantities less than those set forth in 21 U.S.C. § 841(b)(1)(A)-(B). *Compare* 21 U.S.C. § 841(b)(1)(C) *with* § 841(b)(1)(A) *and* § 841(b)(1)(B).). Applying the Sentencing Guidelines, the sentencing judge identified a range of 292 to 365 months' imprisonment. On January 15, 1998, he sentenced Thomas principally to 292 months' imprisonment.

In a second appeal to this Court, Thomas and two of his co-defendants argued, *inter alia*, that *Jones v. United States*, 526 U.S. 227 (1999), mandated the reversal of their convictions because it rendered the quantity of drugs involved in their crimes an issue of fact that increased the maximum penalty for their crimes and, therefore, had to be submitted to a jury and proved beyond a reasonable doubt. *See Thomas II*, 204 F.3d at 383. Our opinion, filed on February 14, 2000, rejected this argument. *See id.* at 384. We held that *Jones* applied only to the particular car-jacking statute interpreted in the case and did not, generally, "rewrite the law regarding what facts must be determined by a jury rather than a judge." *Id.* at 384. We thus joined every other Circuit that had considered the question in holding that, after *Jones*, drug quantity remained a sentencing factor to be determined by the district judge, not an element of the offense to be proved by the prosecutor and found by the jury. *See id.* (collecting cases from other Circuits).

Following our decision in *Thomas II*, the Supreme Court, on June 26, 2000, decided *Apprendi*, which held that "[o]ther than the fact of a prior conviction, *any fact* that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 120 S. Ct. at 2362-63 (emphasis added). The Supreme Court then granted Thomas's petition for a writ of certiorari and remanded this case to us for further consideration in light of *Apprendi*. *See Thomas v. United States*, 121 S. Ct. 749 (2001).

In a related development, on November 11, 2000, a panel of this Court in *United States v. Tran*, 234 F.3d

798 (2d Cir. 2000), held that the government's failure to include in the indictment an element of the sentenced offense is jurisdictional error and thus not subject to plain error review. Tran had been indicted for, and pleaded guilty to, being a felon in possession of a firearm, in violation of 18 U.S.C. § 924(c). He was sentenced, on the other hand, for being a felon in possession of a sawed-off shotgun, which carries a higher sentence than the maximum applicable for being a felon in possession of a firearm *simpliciter*.

The parties are requested to address the following questions in their briefs:

(1) Does drug quantity under 21 U.S.C. § 841, when it increases a defendant's sentence above a statutory maximum, constitute an element of the offense under the analysis used in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Castillo v. United States*, 530 U.S. 120 (2000), and *Carter v. United States*, 530 U.S. 255 (2000), such that it must be alleged in the indictment?

(2) Assuming that an indictment's failure to allege drug quantity is error, under what circumstances is that error subject to harmless or plain error review?

(3) Should this Court's analysis in the instant case be governed or influenced by *United States v. Tran*, 234 F.3d 798 (2d Cir. 2000), and, if so, is *Tran*'s reasoning sound?

The Court is mindful that the parties' responses to these questions may affect other cases that raise questions not directly before the Court in the instant

appeal—for example, cases involving pleas of guilty, stipulations by the parties to the amount of drugs involved, or whether the issue arises on direct or habeas review. Accordingly, the Court encourages consideration in the briefs of any such significant and foreseeable effects of this case.

The appellant's brief shall be filed by May 14, 2001, the appellee's brief shall be filed by June 4, 2001, and the appellant's reply brief shall be filed by June 15, 2001. Oral argument will be held on Wednesday, June 27, 2001 at 1:30 p.m. in the Ninth Floor Courtroom of the United States Courthouse, 500 Pearl Street, New York, New York.

We request that the United States Attorneys in the six districts of the Second Circuit submit a single, joint brief on behalf of the government, because of the importance of the answers to the questions presented to the administration of criminal justice throughout the Circuit. We invite consideration of this appeal as well by the Solicitor General of the United States, to whom a copy of this order shall be delivered. We also invite amicus curiae briefing from the New York Council of Defense Lawyers, the Federal Bar Council, and the Association of the Bar of the City of New York, or their respective committees on criminal law. Joint amicus briefs may be filed. All amicus curiae briefs must be filed no later than June 4, 2001. Appellee may reply to any arguments raised in such briefs by June 15, 2001.

FOR THE COURT,
Roseann B. MacKechnie, Clerk of Court
By: /s/ ROSEANN B. MACKECHNIE